ORIGINAL

OCTOBER TERM 2014

15-5040

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Supreme Court, U.S.
FILED
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On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

CAPITAL CASE
PETITION FOR WRIT OF CERTIORARI

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Dated: June 12, 2015

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CAPITAL CASE
QUESTIONS PRESENTED

1. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009), this Court held that due process requires an "objective" inquiry into judicial bias. The question presented is:

   Are the Eighth and Fourteenth Amendments violated where the presiding Chief Justice of a State Supreme Court declines to recuse himself in a capital case where he had personally approved the decision to pursue capital punishment against Petitioner in his prior capacity as elected District Attorney and continued to head the District Attorney's Office that defended the death verdict on appeal; where, in his State Supreme Court election campaign, the Chief Justice expressed strong support for capital punishment, with reference to the number of defendants he had "sent" to death row, including Petitioner; and where he then, as Chief Justice, reviewed a ruling by the state post-conviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), when it prosecuted and sought death against Petitioner?

2. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court left open the question whether the Constitution is violated by the bias, appearance of bias, or potential bias of one member of a multimember tribunal where that member did not cast the deciding vote. The circuits and states remain split on that question. The question presented is:

   Are the Eighth and Fourteenth Amendments violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Terrance Williams, respectfully prays that a writ of certiorari issue to review the October 1, 2012 denial of Mr. Williams's motion to recuse the Chief Justice of the Pennsylvania Supreme Court and the judgment of the Pennsylvania Supreme Court entered on December 15, 2014, reversing the lower court's grant of a new penalty phase, reinstating Petitioner's sentence of death, and vacating Petitioner's stay of execution.

OPINIONS BELOW

On September 28, 2012, the Philadelphia Court of Common Pleas issued an order granting post-conviction sentencing relief and a stay of execution based upon the Commonwealth's violations of the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Order (Sept. 28, 2012) (A-109).[1] The Commonwealth filed an emergency application with the Pennsylvania Supreme Court to review the order staying Mr. Williams's execution, which the court denied. Order (Oct. 3, 2012) (A-107).

On October 1, 2012, Petitioner filed a motion to recuse Chief Justice Ronald Castille of the Pennsylvania Supreme Court and a request that he refer the recusal motion to the full court if he declined to recuse himself. Chief Justice Castille issued an order on the same day, denying Petitioner's motion to recuse, as well as Petitioner's request that he refer the recusal motion to the full court. Order (Oct. 1, 2012) (A-108).

On December 15, 2014, the Pennsylvania Supreme Court issued an opinion reversing the Philadelphia Court of Common Pleas' grant of post-conviction sentencing relief, vacating the

[1] On November 27, 2012, the court issued a written opinion consistent with its September 28, 2012 ruling from the bench. *Commonwealth v. Williams*, No. CP-51-CR-0823621-1984, (Phila. Ct. Com. Pls. Nov. 27, 2012) (unpublished) (A-39). The court attached a separate "Appendix," which it explicitly made part of the opinion, detailing how the trial prosecutor's testimony before it and conduct during her prosecution of Petitioner led to its determination that she was "less than candid" during her testimony before the court. A-47 n. 23.

stay of execution, and reinstating the sentence of death. *Commonwealth v. Williams*, 105 A.3d 1234, 1236 (Pa. 2014) (A-2). On December 29, 2014, Petitioner filed an application for reargument, which the Pennsylvania Supreme Court denied on February 18, 2015. Order (Feb. 18, 2015) (A-1).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The final judgment of the Pennsylvania Supreme Court was entered on December 15, 2014. The Pennsylvania Supreme Court entered an order denying Petitioner's application for reargument on February 18, 2015. This Court granted Petitioner an extension of time to file a petition for writ of certiorari until June 18, 2015. This petition seeks review of the October 1, 2012 denial of Mr. Williams's recusal motion by Chief Justice Castille, as well as the December 15, 2014 opinion by the full court denying relief and refusing to consider the recusal issue.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case cries out for this Court's intervention. The Chief Justice of the Pennsylvania Supreme Court – and former Philadelphia District Attorney, who personally authorized the pursuit of Petitioner's death sentence – refused to recuse himself from his former office's appeal of a post-conviction court's order granting Petitioner a new penalty trial. The post-conviction court had ruled that the Chief Justice's former subordinates played "fast and loose," "[i]ntentionally rooting evidence out of [Petitioner's] prosecution in order to secure a first degree

murder conviction and death penalty sentence," constituting "gamesmanship" and a "penalty phase by ambush." A-105 n.24, A-47 n.23, A-99. The Chief Justice later joined the opinion reversing the grant of relief and vacating the stay of execution.

As the post-conviction court found, the victim in this case was a sexual predator who preyed on underage boys, including Petitioner, beginning when Petitioner was thirteen years old. Based on both documentary evidence and the testimony of the Commonwealth's key witness, Petitioner's co-defendant, the post-conviction court found that the Philadelphia police and trial prosecutor knew that the victim had sexually abused Petitioner; that the police and prosecutor knew that the eighteen-year-old Petitioner acted at the time of the offense in light of the victim's history of sexually abusing him; that the prosecutor coached the co-defendant to testify that the murder took place in the course of a random robbery; and that the police and prosecutor threatened to charge the co-defendant with another unsolved homicide and "sanitized" statements of other witnesses to conceal the victim's history of abusing other teenage boys.

The post-conviction court found that the prosecution had withheld favorable evidence that was material at capital sentencing because "the favorable evidence could reasonably be taken" to put the case "in such a different light as to undermine confidence in the verdict." *Banks v. Dretke*, 540 U.S. 668, 698 (2004); A-89-90. It therefore granted Petitioner sentencing relief and stayed his execution.

The Pennsylvania Supreme Court reversed the ruling of the post-conviction court. Among the members of the State Supreme Court who voted for reversal was Chief Justice Ronald Castille, who was the elected district attorney of Philadelphia at the time of Petitioner's trial, sentencing, and direct appeal, and *personally authorized* the pursuit of a death sentence in this case. Although Chief Justice Castille's vote was not decisive, the lower courts are split on

the issue of whether the presence of a potentially biased jurist on a multimember tribunal violates due process irrespective of the fact that his vote was not dispositive. This case provides an appropriate vehicle to address the important questions presented for review.

STATEMENT OF THE CASE

A. Trial and Direct Appeal Proceedings

Mr. Williams and his co-defendant, Marc Draper, were convicted of murdering and robbing fifty-six-year-old Amos Norwood in the Ivy Hill Cemetery in the Mount Airy neighborhood of Philadelphia on June 11, 1984. Mr. Williams and Mr. Draper beat Mr. Norwood to death with a tire iron and a wrench, and Mr. Williams subsequently returned to the cemetery to douse Mr. Norwood's body with gasoline and light it on fire. Mr. Williams, who was three months past his eighteenth birthday at the time of the offense, was sentenced to death. The trial prosecutor, Andrea Foulkes, argued during her penalty-phase closing argument that Mr. Williams killed Mr. Norwood "for no other reason but that a kind man offered him a ride home." Tr. 2/3/86 at 1873.

At the penalty phase, the Commonwealth presented evidence of Mr. Williams's prior convictions for the 1984 third-degree murder of Herbert Hamilton and the 1982 armed robbery of Don and Hilda Dorfman, both committed when Mr. Williams was a juvenile. Defense counsel presented three witnesses who "testified to Williams' general good nature and athletic success. In something of an understatement, the Pennsylvania Supreme Court found that this rather generic testimony was 'not compelling.'" *Williams v. Beard*, 637 F.3d 195, 228 (3d Cir. 2010) (quoting *Commonwealth v. Williams*, 863 A.2d 505, 520 (Pa. 2004)).

The sentencing jury found two aggravating circumstances – that the murder was committed during a robbery and that Mr. Williams had a significant history of violent felony convictions based on the Dorfman and Hamilton cases. The jury found no mitigating

circumstances and accordingly sentenced Mr. Williams to death, the only available punishment under Pennsylvania law when at least one aggravating circumstance and no mitigating circumstances are found. 42 Pa. Cons. Stat. § 9711(c)(1)(iv). On appeal, the Pennsylvania Supreme Court affirmed Mr. Williams's convictions and death sentence. *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990).

B. Initial Post-Conviction Proceedings

Mr. Williams filed a petition under Pennsylvania's Post-Conviction Relief Act. The petition alleged, *inter alia*, that trial counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase of trial.[2] Post-conviction counsel presented evidence at a hearing showing that Mr. Williams was subjected to physical and sexual abuse throughout his youth, including sexual abuse at the hands of the victim, Mr. Norwood, starting at age thirteen. *Williams*, 637 F.3d at 229. The Commonwealth responded to this evidence by attacking the credibility of the post-conviction evidence of Mr. Williams's abusive past and attacking the opinions of his mental health experts as unfounded. *E.g.*, Brief for Appellee at *25, *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004) ("The conclusions drawn by the defense experts were completely undermined by their unwavering trust in the self-serving accounts of physical and sexual abuse made by defendant, his family and friends."). The post-conviction court denied relief, and the Pennsylvania Supreme Court affirmed. *Williams*, 863 A.2d at 523. Two justices dissented from the denial of relief. *Id.* at 524, 528-35 (Saylor and Nigro, JJ., dissenting).

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[2] Trial counsel, Nicholas Panarella, Esq., first met Mr. Williams the day before jury selection began. Tr. 1/6/86 at 30. Mr. Panarella was subsequently suspended from the practice of law after pleading guilty to a federal crime. *Office of Disciplinary Counsel v. Panarella*, 849 A.2d 1131, 1131 (Pa. 2004).

Mr. Williams filed a petition for habeas corpus relief in the United States District Court for the Eastern District of Pennsylvania. In federal habeas proceedings, the Commonwealth continued to attack the evidence of abuse and the mental health expert testimony presented in state court on the ground that there was no supporting evidence contemporaneous to the alleged abuse. Response to Penalty-Phase Claims in the Petition for Writ of Habeas Corpus at *89, *Williams v. Beard*, No. 05-cv-3486 (E.D. Pa. May 7, 2007) (disparaging testimony of former teacher James Villareal as being "based on gossip that Norwood molested young boys, which he had allegedly heard even before petitioner murdered Norwood – though he could not identify its source"). The district court found that trial counsel's failure to investigate and present mitigating evidence was deficient performance, but that the state court finding that Mr. Williams was not prejudiced was not unreasonable under the Antiterrorism and Effective Death Penalty Act. *Williams v. Beard*, No. 05-cv-3486, at *86-*97 (E.D. Pa. May 7, 2007) (unpublished).

The Third Circuit assumed, without deciding, that trial counsel's performance was constitutionally deficient, and affirmed the district court's ruling that the state court's no-prejudice ruling was not unreasonable. *Williams*, 637 F.3d at 226, 234-35. In finding that Mr. Williams was not prejudiced by his attorney's performance, the Third Circuit relied heavily on Respondent's attacks on the credibility of the sexual abuse evidence. *Id.* at 230 n.26 ("The Commonwealth assails these allegations of sexual abuse by pointing out that not one of the purported incidents was contemporaneously reported to medical or law enforcement officials. In fact, all of the sexual abuse testimony is based upon statements provided in anticipation of the PCRA hearing. As such, the Commonwealth's point is well taken and we factor it into our prejudice analysis accordingly."). On June 29, 2012, this Court denied Mr. Williams's petition for certiorari review. *Williams v. Wetzel*, 133 S. Ct. 65 (2012).

C. 2012 Post-Conviction Proceedings

On March 9, 2012, Mr. Williams filed another post-conviction petition in the Philadelphia Court of Common Pleas as a result of new information recently revealed by Mr. Draper. Mr. Draper revealed 1) that the Commonwealth had threatened to prosecute him on an unsolved homicide – a fact that was never before disclosed to defense counsel;[3] 2) that he had received a previously undisclosed benefit in the form of a letter the trial prosecutor had promised to write on his behalf to the parole board; 3) that at the Commonwealth's urging he testified falsely at trial that the homicide was motivated by robbery, when it was actually motivated by the childhood sexual abuse Mr. Williams had endured at the hands of Mr. Norwood; and 4) that he had been unwilling previously to disclose any of this information to Mr. Williams's counsel.

On August 8, 2012, Governor Tom Corbett signed a warrant setting Mr. Williams's execution for October 3, 2012. On September 7, 2012, Respondent filed a motion to dismiss the post-conviction petition, arguing, *inter alia*, that it was untimely. The post-conviction court, after holding two oral arguments and requiring an additional proffer from Mr. Williams's counsel, found that Mr. Williams had made a *prima facie* showing of timeliness, and accordingly scheduled an evidentiary hearing. At the evidentiary hearing, which took place on September 20 and 24, 2012, the court heard testimony from Mr. Draper and the trial prosecutor, Ms. Foulkes. During the hearing, additional evidence was uncovered, including previously undisclosed documents from the files of the prosecutor and police.

The hearing focused on Mr. Draper's recent revelation that he informed both police and prosecutors that this case was really about Mr. Williams's sexual "relationship" with the victim,

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[3] Also withheld from the defense was the fact that Mr. Draper was given multiple polygraph examinations by the Commonwealth about the high-profile unsolved murder of a pregnant woman found dead in Philadelphia in 1984. Tr. 9/25/12 at 21-27, 33-36, 109-10; *see also* Post-Conviction Hearing Exhs. P-25, P-26.

rather than a robbery, as he had testified at trial. Mr. Draper testified to that effect at the hearing. Ms. Foulkes, by contrast, repeatedly testified that she never had any inkling that there was any sexual motive to the Norwood killing. Indeed, she specifically testified that she was actively searching for evidence that Mr. Norwood was in a sexual relationship with Mr. Williams, but was unable to find any:

> Like I say, I felt that we had a clearer motive in the Hamilton case[4] and a less clearer [sic] motive to why they did this to Mr. Norwood of all people, but there it was, that's all we had and I would have preferred to have more evidence of the homosexuality if it had existed.

Tr. 9/20/12 (p.m.) at 94.

Among the pieces of newly-revealed evidence, the post-conviction court found as fact that:

- During an initial interview with the police, Commonwealth witness Reverend Charles Poindexter told detectives "that he had 'in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex.'" A-50 n.31 (quoting June 1984 police activity sheet). Reverend Poindexter also "told police 'in confidence' that Mr. Norwood 'may have been a homosexual.'" *Id.* (quoting June 1984 police activity sheet). The version of this interview "turned over to the defense omitted those portions of Rev. Poindexter's statement *entirely*. A-50-51, A-82-83 (emphasis in original). And "Revered Poindexter's trial testimony was devoid of any reference to Amos Norwood's homosexual ephebophilia.[5]" A-73 n.53.

- The prosecution suppressed exculpatory evidence from Mamie Norwood, the victim's widow. In a June 1984 police activity sheet, Mrs. Norwood told police about an early morning encounter between her husband and a young man, during which her husband claimed he had been abducted but wanted no involvement by the police. In the version of Mrs. Norwood's statement disclosed to the defense, "this entire account was omitted." A-50 n.31.

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[4] Ms. Foulkes testified that she knew of the sexual connection between Mr. Williams and Mr. Hamilton. Tr. 9/20/12 (a.m.) at 18; *see also id.* at 34 (Ms. Foulkes was aware of the sexually-related activities involved in the Hamilton killing); *id.* at 34-35 (Hamilton investigation was sex-related; photos of "nude men [were] all over his place").

[5] An ephebophile is an adult who has a sexual attraction to teens. *See* A-51 n.32.

- The trial prosecutor suppressed her handwritten note memorializing "a conversation in which she learned that [R.H.], a 16-year-old boy in Amos Norwood's church, was groped 'on privates' by Mr. Norwood, and that there were other 'possible incidents.'" at A-50 n.30 (quoting Ms. Foulkes' handwritten note found in prosecutor's trial file). "[N]one of that information was turned over to the defense." A-84.

- The trial prosecutor's withheld handwritten notes indicating that an investigative task in Mr. Williams's case should be undertaken by the "faggot squad," A-56 n.38; a handwritten note that Mr. Draper "knew that Terry made $ by going to bed w/men," *Williams*, 133 S. Ct. at 34-35; "Marc Draper 12-27-85," included the following questions—"did he [Mr. Norwood] know Terry – liked boys," "did he like boys," and "how long had he known Terry," *id.*; and another that demonstrated that she "knew that [a detective]'s investigation produced specific information about Mr. Norwood's sexual involvement with parishioners at his church," A-97 & n.10 ("'D. Bennett talks to Rev. Poindexter who advises of other complaints by parishioners re. dec'd's homosexuality.'").

- The trial prosecutor suppressed her handwritten note that the deceased's wife told her that Mr. Williams was on her porch the day her husband disappeared. A-92.

- The trial prosecutor failed to turn over "a criminal complaint and an arrest warrant for a man named Andre Peterson, for having stolen Amos Norwood's credit cards and forged his signature at a jewelry store on June 13, 1984." A-104. At trial, Ms. Foulkes called the jewelry store clerk who sold jewelry to a man claiming to be Amos Norwood and who testified that it was Mr. Williams who purchased the jewelry. A-105. The court found this to be "yet another instance in which the prosecutor erred on the side of not disclosing evidence that could have been favorable to [Mr. Williams]." *Id.*

After hearing the testimony from Ms. Foulkes and Mr. Draper, and reviewing the police and prosecutorial files, the post-conviction court found that "evidence was plainly suppressed." A-79. Given that the evidence proving the *Brady* violation had been suppressed for nearly three decades by the Philadelphia District Attorney's Office, the post-conviction court found that the petition was timely and properly filed. A-52-62. The post-conviction court went on to state that the "pattern of non-disclosure" "calls into question the trial prosecutor's intent as the architect of the prosecution," and found that Ms. Foulkes engaged in "'gamesmanship,' choosing not to disclose evidence that would have supported the contention that [Mr.Williams] had been the

victim of Mr. Norwood's sexual advances." A-93; *see also* A-92-106 (court's 15-page Appendix solely addressing Ms. Foulkes' "gamesmanship").

The post-conviction court found that, collectively, this undisclosed evidence was material at sentencing, as "[w]ithout this evidence, [Mr. Williams]'s counsel was given a skewed and incomplete picture of the victim which effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character." A-64. If disclosed, the evidence would have explained "how Norwood's sexual advances amounted to a mitigating 'circumstance of the offense.'" *Id.* "In two different places during her penalty-phase closing argument, the trial prosecutor's comments about appellee's motive for the commission of this crime could have been effectively rebutted – or precluded – had the suppressed evidence been disclosed." A-85, A-87 ("Not only would reasonable defense counsel have directly rebutted the centerpiece of the Commonwealth's penalty-phase closing argument – that [Mr. Williams] killed Amos Norwood 'for no other reason but that a kind man offered him a ride home' – but that attorney would have then explained how the sexual pressure imposed on [Mr. Williams] by Norwood was a 'circumstance of his offense,' as it clouded his judgment." (footnote omitted)).

On the afternoon of September 28, 2012, the same day that the Court of Common Pleas issued its decision from the bench, Respondent sought review of the post-conviction court's ruling through an emergency application to the Pennsylvania Supreme Court to vacate the stay of execution. On October 3, 2012, the Pennsylvania Supreme Court denied Respondent's application for emergency relief. Order (Oct. 3 2012)(A-107). On December 15, 2014, the Pennsylvania Supreme Court, in an opinion joined by Chief Justice Castille, reversed the post-conviction court's grant of penalty-phase relief and lifted the stay of execution. Mr. Williams

filed an application for reargument on December 29, 2014, which the Pennsylvania Supreme Court denied on February 18, 2015.

On January 13, 2015, then-Governor Corbett issued a new warrant for Mr. Williams, setting his execution date for March 4, 2015. On February 13, 2015, Governor Tom Wolf issued a temporary reprieve to Mr. Williams pending the issuance of the legislative task force's report on the state of Pennsylvania's death penalty.[6]

D. Motion to Recuse Chief Justice Castille

Chief Justice Castille was the elected District Attorney for Philadelphia from January 6, 1986, until March 12, 1991. As such, he was the District Attorney throughout the trial, capital sentencing, post-trial, and direct appeal proceedings in this case. The trial prosecutor who was found to have violated her *Brady* obligations was a member of his staff.

Chief Justice Castille *personally authorized* his Office to seek the death penalty in this case. Chief Justice Castille's death penalty authorization is memorialized in a hand-written note on a typed memorandum from Andrea G. Foulkes to Mark Gottlieb, who was then the Chief of the Philadelphia District Attorney's Office's Homicide Unit. A-110-111. The two-page memorandum, dated January 21, 1986, begins with the following sentence: "In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty." A-110. The remainder of the memorandum includes a factual synopsis of the case and a discussion of aggravating and mitigating circumstances from the trial prosecutor's perspective.

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[6] The Philadelphia District Attorney's Office is currently challenging this reprieve in the Pennsylvania Supreme Court. *See* Order (March 3, 2015) (ordering a briefing schedule be set "so that the parties may brief the issue of the propriety of this Court's exercise of King's Bench review as well as the merits of the issues raised").

At the bottom of the memorandum, there are two handwritten notes. The first is from Homicide Chief Mark Gottlieb, and it reads as follows:

> Ron,
> I recommend seeking Death
> M. Gottlieb 1/22/86

A-111. Just below the first notation is a second note, from then-District Attorney Castille, which reads as follows:

> Mark,
> Approved to proceed on the Death Penalty.
> Ronald D. Castille

Id.; *see also* Tr. 9/20/12 (a.m.) at 11 (identification by Ms. Foulkes of Chief Justice Castille's signature on authorization document).

Following Mr. Williams's conviction and death sentence, the Philadelphia District Attorney's Office filed a brief in the Pennsylvania Supreme Court on direct appeal, asking the Court to affirm Mr. Williams's convictions and death sentence. Then-District Attorney Castille is one of the listed counsel for the Commonwealth on the cover and the signature page of the brief. Brief of Appellee, *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990).

In the current post-conviction proceedings, evidence was introduced that, on June 23, 1988, trial prosecutor Foulkes wrote a letter to the Pennsylvania Board of Probation and Parole on behalf of co-defendant Draper, the only eyewitness to the murder and the key Commonwealth witness at Mr. Williams's trial. *See* Post-Conviction Hearing Exh. P-15. Although Chief Justice Castille is not the signatory of the letter, the letter is written on the official letterhead of the Philadelphia District Attorney's Office and the sole name on the letterhead is "Ronald D. Castille, District Attorney." *Id.* The letter asks the Board to "consider [Mr. Draper's] cooperation . . . when determining his eligibility for parole or commutation," and notes that this

recommendation from the prosecutor was "the only benefit or promise conveyed to" Mr. Draper in exchange for his testimony against Mr. Williams. *Id.* Despite the existence of this promise to write the parole board, as expressed in the letter, Ms. Foulkes elicited from Mr. Draper at both the Norwood and the Hamilton trials that the full extent of his deal was a plea to second-degree murder and a life sentence. Tr. 9/20/12 (a.m.) at 163. Indeed, at the Hamilton trial Ms. Foulkes specifically elicited from Mr. Draper the fact that he understood that the District Attorney's Office would not write to the parole board on his behalf. *Id.* at 170. The trial prosecutor conceded at the recent post-conviction hearing that this promise to the Commonwealth's witness was not disclosed to the defense at trial and that she "would do it differently today." Tr. 9/20/12 (p.m.) at 25.

In its post-conviction ruling, the Court of Common Pleas cited this undisclosed inducement, among several other items, as evidence demonstrating that the trial prosecutor – an employee of then-District Attorney Castille – suppressed exculpatory evidence, played "fast and loose" with the truth, "had no problem disregarding her ethical obligations," and "took unfair measures to win." Tr. 9/28/12 at 37, 39, 45. Indeed, while the post-conviction court found that the undisclosed deal aspect of Mr. Williams's *Brady* claim was time barred, she specifically noted "that Ms. Foulkes' solicitation of false testimony on direct examination, *and* her failure to correct Draper's false testimony on cross-examination, could have been a potentially viable claim under *Giglio* [*v. United States*, 405 U.S. 150 (1972)], as non-disclosure of a promise made to a witness and subsequent testimony that there was a promise, violates a defendant's due process right to a fair trial if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" A-101 n. 13.

In 1993, Chief Justice Castille campaigned for a position as a Justice on the Pennsylvania Supreme Court. His election campaign stressed his record as Philadelphia's District Attorney. In particular, then-candidate Castille emphasized his pursuit of capital punishment and the fact that, as District Attorney, he "put 45 people on death row," one of whom is Mr. Williams. Examples include:

- "Castille . . . campaigned as the tough-as-nails scourge of criminals . . . . Castille's career as Philadelphia's district attorney, where he built a reputation as a law-and-order crime buster, thrust him in the public eye." Katharine Seelye, "Castille Defeats Nigro for Seat on Supreme Court," PHILADELPHIA INQUIRER, Nov. 3, 1993, *available at* 1993 WLNR 1995447;

- "Castille . . . hopes a law-and-order message, coupled with name recognition in southeastern Pennsylvania, will help him win. . . . 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my) sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" Frank Reeves, "Castille Preaches Law-and-Order Message to Voters," PITTSBURGH POST-GAZETTE, Oct. 18, 1993, *available at* 1993 WLNR 2134084;

- "Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues. . . . Castille talks about bringing a prosecutor's perspective to the bench . . . ." Tim Reeves, "High Court Hopefuls Pressing for Change," PITTSBURGH POST-GAZETTE, Oct. 17, 1993, *available at* 1993 WLNR 2117584;

- "Some candidates . . . skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille – who, while pursuing a job requiring him to hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor." Lynn A. Marks & Ellen Mattleman Kaplan, "Disorder in the Courts," PITTSBURGH POST-GAZETTE, Nov. 14, 1993, *available at* 1993 WLNR 2150772;

- Candidates "Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day. Under the current [legal] restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. 'There's really no solution to it,' Castille says. 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get*

the hint.'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," LEGAL INTELLIGENCER, Oct. 28, 1993 (emphasis added).

Chief Justice Castille was elected and assumed his position on the Pennsylvania Supreme Court in January 1994.

On October 1, 2012, Mr. Williams filed a motion in the Pennsylvania Supreme Court requesting that Chief Justice Castille recuse himself in this case, or, should Chief Justice Castille decline to recuse himself, that the motion be referred to the full court for decision. Later that same day, the Philadelphia District Attorney's Office filed an opposition to Mr. Williams's recusal motion. Still later on October 1, Chief Justice Castille issued a one-sentence order on the motion, which reads as follows: "AND NOW, this 1st day of October, 2012, Respondent's Motion for Recusal is DENIED, as is the request for referral to the full Court." A-108. As noted, *supra*, Chief Justice Castille joined the opinion issued December 15, 2014, reversing the grant of relief.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS AND THE EIGHTH AMENDMENT REQUIRE THAT A DEATH PENALTY CASE BE DECIDED BY AN IMPARTIAL TRIBUNAL THAT "PRESERVES BOTH THE APPEARANCE AND REALITY OF FAIRNESS."

Chief Justice Castille's refusal to recuse himself from this case violated Mr. Williams's Due Process and Eighth Amendment rights. The "Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *accord In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This Court has explained that

> [t]his requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

Marshall, 446 U.S. at 242 (internal citations omitted). An individual, the Court wrote, must be assured "that the arbiter is not predisposed to find against him." *Id.*

This due process right "has been jealously guarded by this Court" because it "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Id.* (citation and internal quotation marks omitted). This due process requirement takes on even greater significance in a capital case, because of the Eighth Amendment's heightened due process requirements. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

A "fair and impartial tribunal," guaranteed by the Eighth and Fourteenth Amendments, requires not just "an absence of actual bias" – there must not be "even the probability of unfairness" and "'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 135-36 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As the Court recently stated in *Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009): "Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

In *Caperton*, the Supreme Court of West Virginia reversed a $50 million trial judgment entered against Massey Coal Company by a vote of 3-2. One of the justices in the majority denied a recusal motion, which was based on the fact that the Massey CEO had contributed $3 million to the justice's election campaign. *Caperton*, 556 U.S. at 872. This Court found that under the circumstances of the case, due process required recusal. *Id.* The Court explained that

> [t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

Id. at 881. With regard to the need for an objective standard, the Court noted that

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Id. at 883-84 (internal citations omitted). These "objective standards" require recusal when the situation "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused." *Id.* at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)); *id.* at 879 (same).

This Court also acknowledged the problems inherent in a system where "there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias." *Id.* at 885. This Court determined that while the justice "did undertake an extensive search for actual bias," this search is "just one step in the judicial process." *Id.* at 886. The Court held that regardless of whether such an inquiry may "sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," the "failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." *Id.* This is so because "justice must satisfy the appearance of justice." *Offutt*, 348 U.S. at 14.

While the "possible temptation" standard "cannot be defined with precision," *Murchison*, 349 U.S. at 136; *Caperton*, 556 U.S. at 879, it applies here, where Chief Justice Castille was the District Attorney responsible for prosecuting Mr. Williams at trial and on direct appeal; where Chief Justice Castille in a handwritten note personally authorized his Office to

seek the death penalty for Mr. Williams; where Chief Justice Castille's name appears as counsel for the Commonwealth on the direct appeal brief seeking affirmance of Mr. Williams's convictions and death sentence; where the claims presented in this case include claims that the District Attorney's Office, then headed by Chief Justice Castille, violated due process by suppressing mitigating evidence and presenting false and misleading information to the jury; where Chief Justice Castille's name appears as District Attorney on letterhead of a document that is part of the evidence in this case; and where Chief Justice Castille's campaign for judicial office highlighted his obtaining the death penalty in a number of capital cases, including Mr. Williams's case.

Respondent respectfully submits that, considering "all the circumstances of this case, due process requires recusal." *Caperton*, 556 U.S. at 872. Moreover, consideration of some of the circumstances individually highlights why that is so.

Where a judge is part of the "accusatory process," there is cause for recusal. *Murchison*, 349 U.S. at 137; *see also Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363 (7th Cir. 1994) (finding no due process violation where judge was prosecutor in prior unrelated prosecution of defendant but "did not serve dual role of prosecutor and judge" in the prosecution at issue). For example, in *Murchison*, the judge who presided at trial had conducted "'one-man grand jury' proceedings" that resulted in the defendant's indictment. *Id.* at 136. This Court held:

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Id. at 137; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (characterizing Murchison's holding by noting that the "judge violated due process by sitting in the criminal trial of defendant whom he had indicted"). This Court noted that in such instances, "it is difficult if

not impossible for a judge to free himself from the influence of what took place" previously, particularly because the judge would be "more familiar with the facts and circumstances in which the charges were rooted than was any other witness." *Murchison*, 349 U.S. at 138.

Here, the due process violation is even clearer than it was in *Murchison*. While the *Murchison* judge returned the indictment while acting as a judge and, thus, did "not likely have all the zeal of a prosecutor," *id.* at 137, then-District Attorney Castille was the prosecutor who personally authorized his Office to seek the death penalty in Terrance Williams's case.

Moreover, Chief Justice Castille then participated in the review of the lower court's denunciation of the actions of those under his supervision, including a finding that his office withheld exculpatory evidence and that "the suppression of this evidence . . . undermines confidence in the jury's death sentence." A-51. It is hard to imagine a claim more susceptible to bias. If ever there was a case that "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused," *Caperton*, 556 U.S. at 878, this is it.

The reports of and quotes from Chief Justice Castille's judicial election campaign further highlight the due process violation. The *Caperton* decision made clear that judicial elections can create circumstances under which due process requires judicial recusal. Justice John Paul Stevens has stated: "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases." John Paul Stevens, *Opening Assembly Address, A.B.A. Ann. Meeting*, 12 St. John's J. Legal Comment. 21, 30-31 (1996); *see also* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 Ariz. L. Rev. 317, 319 (2002) (under due process analysis required by *Caperton*, "tough-on-crime elective judges should recuse

themselves from all criminal cases"). But such a sweeping rule is not necessary here. Chief Justice Castille's campaign was not just "tough on crime" or pro-death penalty, it was based in part on his record as District Attorney of putting people on death row, *one of whom is Mr. Williams*. Under these circumstances, at least, due process counseled in favor of Chief Justice Castille's recusal.

This Court should grant certiorari review and vacate the Pennsylvania Supreme Court's ruling, which violates Mr. Williams's Eighth and Fourteenth Amendment rights.

II. This Court Should Grant Review to Decide the Question It Left Open in *Aetna Life Insurance Co. v. Lavoie*, on which State and Circuit Courts Are Split: Whether Due Process and the Eighth Amendment Require Relief from the Decision of a Panel that Included a Potentially Biased Jurist, Even When the Jurist Did Not Cast the Deciding Vote.

In this case, the judge whose recusal was sought did not cast a decisive vote. This Court has previously noted the open question of whether the bias, appearance of bias, or potential bias of a tribunal member violates due process even where he does not ultimately cast a decisive vote in the matter. The lower courts are split on this important question. Review is of particular importance in this capital case, where the Eighth Amendment's heightened procedural safeguards apply.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court noted that it was an open question whether the disqualification of one member of a multi-member tribunal requires a decision to be vacated where the disqualified member did not cast a decisive vote:

> Our prior decisions have not considered the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case. . . . [W]e are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Aetna, 475 U.S. at 827-28 (footnotes omitted). *Caperton* provides an analogous scenario, given that the judge whose qualification to serve was challenged also provided a decisive vote. *Caperton*, 556 U.S. at 874-75.

Justice Brennan, concurring in *Aetna*, explained the impact of each participant in a tribunal's deliberations:

> The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

475 U.S. at 830-831 (Brennan, J., concurring).

The circuits remain split on this question. In *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986), following *Aetna*, the Fifth Circuit concluded that one of the judges who heard the petitioner's appeal was "disqualified" and that his participation violated due process of law because his name had appeared on the state's brief on appeal as the state prosecuting attorney. Nevertheless, the court denied habeas relief because, "[l]acking a showing in this case that [the judge's] vote was controlling, no prejudice has been shown as the result of the conclusion that he should have recused himself." *Id.* at 101; *see also Richardson v. Quarterman*, 537 F.3d 466, 476-77 (5th Cir. 2008) (applying *Bradshaw*).

Other circuits, however, have found that the participation of a biased member of a tribunal requires relief even if that member does not cast the deciding vote. *See Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995) ("The plaintiff need not demonstrate that the biased

member's vote was decisive or that his views influenced those of other members. . . . [B]ias on the part of a single member of a tribunal taints the proceedings and violates due process."); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (proceedings "nullified" because "there is no way of knowing" how tainted member's participation affected deliberations); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966) (result of Commission's decision tainted by participation of biased member although "his vote was not necessary for a majority"); *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591-92 (D.C. Cir. 1970) (following *Berkshire* and *American Cyanamid*); *cf. Hicks v. City of Watonga*, 942 F.2d 737, 748-49 (10th Cir. 1991) (if one member of tribunal is found to be biased, presence "will have tainted the tribunal and violated [litigant's] due process rights").

State courts, too, have taken a variety of approaches in the wake of *Aetna*. The Texas Supreme Court reviewed the diverging views in *Tesco American, Inc. v. Strong Industries, Inc.*, 221 S.W.3d 550, 554-56 (Tex. 2006), and concluded that "the judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified; it would be stretching the Constitution too far to simply assume she was not involved." *Id.* at 556. Some states, including Pennsylvania, have refused to vacate judgments based on the votes of disqualified judges that are "mere surplusage." *See Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989); *see also State v. Lund*, 718 A.2d 413, 418 (Vt. 1998). Other states, in addition to Texas, hold that a disqualified participant, or at least a disqualified author, requires that the judgment be vacated. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339,

1340-41 (Ala. 1987) (following remand from Supreme Court for further proceedings in light of *Aetna*, Alabama Supreme Court conducts complete rebriefing and redetermination of case with participation of full court of unbiased justices, even though "offending" justice did not cast deciding vote); *Sullivan v. Mayor of Town of Elsmere*, 23 A.3d 128, 136 (Del. 2011) (bias of one member of multimember adjudicatory tribunal deprives party of due process regardless of whether biased member's vote necessary to judgment); *Powell v. Anderson*, 660 N.W.2d 107, 123 (Minn. 2003) (vacating unanimous judgment as disqualification of authoring judge not cured by participation of two qualified judges); *Reg'l Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 253-54 (Utah 1992) (vacating and remanding judgment authored by disqualified judge).[7] At least one state court has held that a disqualified author required recusal of the entire court. *See Johnson v. Sturdivant*, 758 S.W.2d 415, 415-16 (Ark. 1988).

In Mr. Williams's case, the participation of Chief Justice Castille violated due process even though his was not the deciding vote. Not only did his "involvement play[] a part" in the disposition, *see Aetna*, 475 U.S. at 830-31 (Brennan, J., concurring), but he was the Chief Justice and, as such, had the added responsibility and power of assignment. *See* Pa. Sup. Ct. Internal Operating Procedures § 3(B) ("The Chief Justice will assign submitted cases in a rotation schedule by seniority .... Capital PCRA appeals shall be assigned in a separate rotation, to ensure an even distribution of responsibility in those appeals. If it appears that there is an unequal distribution of cases or a delay in deciding cases, the Chief Justice may, as a matter of his or her discretion, alter the assignment order.").

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[7] *See In re Inquiry Concerning Judge*, 81 P.3d 758 (Utah 2003) (declining to follow *Reichert* on other grounds).

If nothing else, Chief Justice Castille's prior participation in Mr. Williams's prosecution does not "satisfy the appearance of justice." *Offut*, 348 U.S. at 14. In addition to the Chief Justice's having already expressed, while District Attorney, his belief that a death sentence is appropriate in this case, Chief Justice Castille was privy to the facts regarding the crime and aggravating and mitigating factors as alleged in the Commonwealth's Memorandum seeking authorization to pursue the death penalty in Mr. Williams's case. A-110-11. This memorandum outlined the instant offense, as well as details of Mr. Williams's prior crimes, including noting a then-current robbery charge, which was subsequently dismissed. The memo noted only the following with regard to mitigating circumstances in the case:

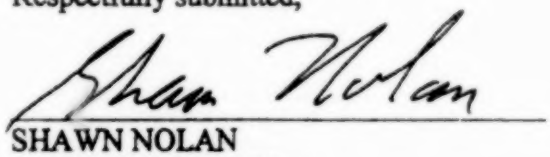
> defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde [sic] personality.

A-111. Thus, just as in *Murchison*, Chief Justice Castille was "more familiar with the facts and circumstances in which the charges were rooted" than anyone else on the tribunal. *Murchison*, 349 U.S. at 138. And it was no doubt "difficult if not impossible for [him] to free himself from the influence of what took place" previously. Indeed, the information contained in the Commonwealth's Memorandum seeking authorization is inaccurate and incomplete in light of the new, previously-withheld evidence uncovered during the course of the 2012 evidentiary hearing.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Mr. Williams respectfully requests that the Court issue a writ of certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,



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Dated: June 12, 2015

OCTOBER TERM 2014

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 688 CAP
Appellant	: Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	: No. CP-51-CR-0823621-1984, granting a Stay of Execution
TERRANCE WILLIAMS,	: SUBMITTED: September 18, 2013
Appellee	:
COMMONWEALTH OF PENNSYLVANIA,	: No. 669 CAP
Appellant	: Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	: No. CP-51-CR-0823621-1984
	: SUBMITTED: September 18, 2013
TERRANCE L. WILLIAMS,	:
Appellee	:

ORDER

PER CURIAM

AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is **DENIED**.

opy
18/2015

Watson Jr., Esquire
Prothonotary
e Court of Pennsylvania

[J-82A-2013 and J-82B-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, STEVENS, JJ.

COMMONWEALTH OF PENNSYLVANIA,	No. 668 CAP
Appellant	Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	No. CP-51-CR-0823621-1984, granting a Stay of Execution
TERRANCE WILLIAMS,	SUBMITTED: September 18, 2013
Appellee	
COMMONWEALTH OF PENNSYLVANIA,	No. 669 CAP
Appellant	Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	No. CP-51-CR-0823621-1984
	SUBMITTED: September 18, 2013
TERRANCE L. WILLIAMS,	
Appellee	

OPINION

MR. JUSTICE EAKIN **DECIDED: December 15, 2014**

The Commonwealth appeals from the order granting a stay of execution, vacating appellee's death sentence, and awarding a new penalty hearing under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We vacate the stay of execution and the grant of a new penalty phase, and reinstate the sentence of death.

Appellee was sentenced to death after being convicted of the robbery and murder of Amos Norwood February 3, 1986, his second murder conviction. A detailed account of the crime is set forth in our opinion on direct appeal. See Commonwealth v. Williams, 570 A.2d 75, 77-79 (Pa. 1990). Suffice it to say, appellee and his co-conspirator, Marc Draper, took Norwood to a graveyard, tied him with his own clothes, and beat him to death with a tire iron — appellee returned the next day and set fire to the corpse. At trial, appellee testified that Draper and another individual committed the crime; he claimed he was elsewhere at the time and uninvolved. He testified he did not know the victim, had never seen him before, and had no reason to be angry with him or wish to harm him. This Court affirmed the judgment of sentence February 8, 1990, id., at 84, and appellee did not seek certiorari. He filed a timely PCRA petition March 24, 1995.

At the 1998 PCRA hearing, now represented by the Federal Community Defenders Office (FCDO), appellee abandoned his trial testimony and argued Norwood engaged in homosexual acts with him, and as set forth below, presented evidence supporting this claim. The PCRA court denied relief, and this Court affirmed. Commonwealth v. Williams, 863 A.2d 505, 523 (Pa. 2004). Appellee filed a second PCRA petition February 18, 2005, which was dismissed as untimely. This Court affirmed. Commonwealth v. Williams, 909 A.2d 297 (Pa. 2006) (per curiam). Appellee filed a third PCRA petition June 1, 2005, which was dismissed as untimely, and we affirmed. Commonwealth v. Williams, 962 A.2d 609 (Pa. 2009) (per curiam).

While that PCRA appeal was pending before this Court, appellee filed a federal habeas corpus petition December 19, 2005, which was denied. The Third Circuit affirmed. Williams v. Beard, 637 F.3d 195, 238 (3d Cir. 2011). In his federal appeal, appellee contended trial counsel was ineffective for failing to present evidence he was psychologically damaged by years of sexual abuse, which infused him with rage toward

men who made sexual advances toward him; appellee argued Norwood was one of these men and had been sexually abusing him since the age of 13. Appellee petitioned the United States Supreme Court for certiorari, which was denied. Williams v. Wetzel, 133 S. Ct 65 (2012) (per curiam).

On January 9, 2012, the FCDO visited Draper, who was serving a life sentence at SCI-Frackville. That same day, Draper signed an affidavit declaring he told detectives and the prosecution prior to trial that Norwood was a homosexual and was in a relationship with appellee. The affidavit also claimed the prosecution "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." Draper's Affidavit, 1/9/12, at 4. The FCDO revisited Draper March 1, 2012, obtaining another affidavit with similar declarations.

Appellee then filed this facially untimely PCRA petition March 9, 2012, his fourth state petition for collateral review. On July 27, 2012, he filed a "Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution," although no execution warrant had been signed. An execution warrant was subsequently issued August 8, 2012, setting the execution for October 3, 2012. Appellee filed a "Renewed Motion for Stay of Execution" August 28, 2012, and the Commonwealth filed a response September 7, 2012. On September 6, 2012, appellee filed a motion for discovery, requesting the production of exculpatory information from the Commonwealth "as well as any reports or notes made concerning Norwood's sexual relationship or sexual abuse of [appellee] or any other child under the age of 18." Appellee's Motion for Discovery, 9/6/12, at 5-6.

On September 10, 2012, the PCRA court heard argument on the pleadings to determine whether the petition warranted an evidentiary hearing. The court gave appellee time to obtain and submit additional information from Draper, which led to his

third affidavit, dated September 11, 2012. On September 14, the court heard additional argument and ordered an evidentiary hearing, which began September 20; only Draper and the trial prosecutor testified. On Saturday, September 22, the court ordered the Commonwealth to produce trial files and Philadelphia Police Department files and allowed both parties to review those files.[1] On September 24, documents from these files were offered and admitted into evidence, and the PCRA court entered 11 exhibits sua sponte. See Exhibit List, 9/20/12. The court then directed appellee to amend his PCRA petition; on September 28, appellee filed an "Amendment and Supplement to Petition for Post-Conviction Relief," requesting relief because the Commonwealth had given "sanitized" witness statements to the defense. The same afternoon, the court ruled there was a Brady[2] violation because that which was missing from original discovery suggested Norwood may have been a "homosexual ephebophiliac." PCRA Court Opinion, 11/27/12, at 12-13 (citations omitted).[3]

The PCRA court also concluded appellee's fourth PCRA petition met the "governmental interference" exception to the PCRA's timeliness requirement, 42 Pa.C.S. § 9545(b)(1)(i),[4] though it did not meet the "newly-discovered evidence" exception, id., §

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[1] The court's order included files for both the Norwood murder and the murder of Herbert Hamilton. Both murders had the same trial prosecutor, the same defendant (appellee), and the same key witness (Draper). In the Hamilton murder, appellee was receiving money from Hamilton in exchange for sex; appellee murdered Hamilton when he threatened to expose this relationship. Although the charge was first degree murder, the jury convicted appellee of third degree murder, about one year before the Norwood trial.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

[3] The PCRA court defined "homosexual ephebophilia" as a psychological term for the attraction to "young men," both adults and adolescents. See id., at 13 n.32.

[4] Subsection (b)(1)(i) provides an untimely PCRA petition falls within an exception if the petitioner proves: "the failure to raise the claim previously was the result of interference by (continued...)

9545(b)(1)(ii).[5] The court ordered a stay of execution pursuant to § 9545(c)(2),[6] finding appellee exceeded the "strong likelihood" threshold and demonstrated actual success on the merits of his claim regarding the penalty phase. The court held the Commonwealth violated Brady and found appellee identified a specific claim, Norwood's homosexual ephebophilia, which he was unable to discover or develop due to interference by the Commonwealth. The interference consisted of withholding or "sanitizing" three specific pieces of evidence: a statement by Norwood's wife, a statement by the pastor of appellee's church, and notes made by the prosecutor.

The first statement involved a story Norwood's wife told police, which was omitted from the 1984 police activity sheet. She said Norwood once woke her at 2 a.m. and asked her for money while a young male stood in the hall outside their bedroom. She saw Norwood load stereo equipment into his car and drive away with the young male. She told police she believed this to be a kidnapping; when Norwood returned home around 9 a.m., he said he was abducted but escaped by using psychology on his captors. When his wife tried to call the police, Norwood asked her to avoid their involvement.

The second statement was from appellee's pastor, who was also a friend of Norwood. The pastor told police Norwood worked with and counseled young males in

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(...continued)
government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States[.]" Id.

[5] Subsection (b)(1)(ii) provides an exception for an untimely PCRA petition if the petitioner proves: "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" Id.

[6] Subsection (c)(2) states no stay may be issued unless a PCRA petition meeting all requirements of this subchapter of the PCRA has been filed and is pending, and the petitioner makes "a strong showing of likelihood of success on the merits." Id., § 9545(c)(2).

the church for many years. Omitted from the 1984 activity sheet was the pastor's suspicion that Norwood may have been a homosexual, and that five years earlier, the pastor received a complaint from a mother alleging Norwood propositioned her 17-year-old son for sex. The pastor also repeated for police the "kidnapping" story told by Norwood's wife — this was included with the pastor's statements in the 1984 police activity sheet, which had been disclosed to the defense.

The court also found the Commonwealth failed to disclose handwritten notes by the trial prosecutor, purportedly recounting an instance of Norwood's behavior toward a teenage male, which would establish the prosecution's awareness of Norwood's homosexual proclivities. The court stated, had such evidence been disclosed to the defense, trial counsel would have been able to challenge the Commonwealth's sympathetic portrayal of Norwood. The court concluded the inability to portray an unsympathetic victim was enough to undermine one's confidence the jury would have returned the same verdict of death.[7]

Finding appellee exercised due diligence, the court concluded he did not know this evidence existed until his co-conspirator executed an affidavit in January, 2012, declaring a possible motive for the crime, i.e., rage over being sexually abused by Norwood. Appellee timely filed his PCRA petition within 60 days of learning the substance of Draper's affidavit. Furthermore, the court noted appellee could not have known the

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[7] The court also stated the Commonwealth interfered with appellee's Brady claim by "disput[ing] the existence of information in [its] files about [] Norwood's homosexual ephebophilia" when the Commonwealth represented to the 1998 PCRA court that the only evidence involved in the case was appellee's knowledge that Norwood was a homosexual and his plan to extort money from Norwood but mentioned nothing about the additional "homosexual ephebophilia" evidence. PCRA Court Opinion, 11/27/12, at 15-17. The court added a supplemental opinion to its PCRA opinion, describing additional instances that led it to conclude the prosecution exhibited "gamesmanship." See id. app., at 1-15.

Commonwealth interfered with his ability to present evidence of Norwood's homosexual ephebophilia until the underlying evidence was uncovered during the hearing held as a result of Draper's affidavit; therefore, appellee timely filed the amendment and supplement to his PCRA petition in order to particularize his Brady claim just three days after government files were opened. Accordingly, the court concluded appellee met his burden under 42 Pa.C.S. § 9545(b)(1)(i), and subsection (b)(2), so it had jurisdiction to grant relief. Finding appellee established his Brady claim, the court held he was entitled to a new penalty hearing. The court denied relief regarding the guilt phase. The Commonwealth filed this appeal, raising two issues for our review regarding the timeliness of appellee's fourth PCRA petition and the merits of his Brady claim.[8]

Our standard of review of the PCRA court's grant of relief is clear: we examine whether the court's findings are supported by the record and whether its conclusions of law are free from legal error. Commonwealth v. Colavita, 993 A.2d 874, 886 (Pa. 2010). All PCRA petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final" unless an exception to timeliness applies. 42 Pa.C.S. § 9545(b)(1). "The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal

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[8] The Commonwealth's issues, set forth verbatim, are:

> I. Was [appellee]'s fourth PCRA petition, in which he alleged a violation of Brady[] based on the non-disclosure of information he had known since before trial, untimely?
>
> II. In any event, was [appellee]'s Brady claim meritless where the information in question would not have been reasonably likely to change the outcome, had no apparent exculpatory value, and had been known all along by [him]?

Commonwealth's Brief, at 3.

authority to address the substantive claims." Commonwealth v. Chester, 895 A.2d 520, 522 (Pa. 2006) (first alteration in original) (internal citations and quotation marks omitted). As timeliness is distinct from the merits of the underlying claims, we must first determine whether appellee's PCRA petition was timely filed in order to decide whether this Court has legal authority to address its substantive claims. See Commonwealth v. Stokes, 959 A.2d 306, 310 (Pa. 2008) (consideration of Brady claim separate from consideration of its timeliness).

This, appellee's fourth PCRA petition, was untimely on its face, as it was filed over 20 years after his judgment of sentence became final. The PCRA petitioner has the burden of proving an untimely petition falls within an exception outlined in § 9545(b)(1). See Commonwealth v. Hawkins, 953 A.2d 1248, 1253 (Pa. 2008) ("[I]t is the [petitioner]'s burden to allege and prove that one of the timeliness exceptions applies." (citation omitted)). Furthermore, any PCRA petition filed under a timeliness exception must be filed within 60 days of when the petition could have first been presented. 42 Pa.C.S. § 9545(b)(2). "'[T]he 60-day rule requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence.'" Commonwealth v. Albrecht, 994 A.2d 1091, 1094 (Pa. 2010) (quoting Stokes, at 310).

Although a Brady violation might fall within the "governmental interference" exception, § 9545(b)(1)(i) nonetheless requires a petitioner to plead and prove: (1) the failure to previously raise the claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence. Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1268 (Pa. 2008) (citation omitted). The merits of a Brady claim need not be addressed until it is established that the instant petition was timely filed. Stokes, at 310. Thus, the proper

questions for our review are whether the Commonwealth interfered with appellee's ability to present a claim that Norwood was a homosexual with a sexual attraction to teenage males, and whether appellee was duly diligent in obtaining such information.

The PCRA court held it had jurisdiction under the "governmental interference" exception to the PCRA's time-bar, concluding the alleged Brady violations posited by appellee met the requirements of 42 Pa.C.S. § 9545(b)(1)(i). The Commonwealth contends appellee's PCRA petition failed to establish this exception, as appellee would have known well before trial of any sexual relationship or abuse between Norwood and himself. In fact, the Commonwealth argues, if anyone knew about Norwood's homosexual proclivities toward teenage males, it was appellee himself. The Commonwealth points to the evidence of appellee's statements during the murder, taunting Norwood for "liking boys," and appellee's plan to extort Norwood by threatening to expose his homosexual activity.

Further, the Commonwealth contends appellee not only could have presented evidence of ephebophilia much sooner, but points out appellee did present just such a claim during his first PCRA proceedings in 1998, where he offered testimony from several witnesses alleging Norwood sexually abused him. The Commonwealth also posits that appellee's instant PCRA petition admitted he knew about Norwood's homosexual tendencies years before the murder. Since appellee already knew about this alleged material evidence, the Commonwealth contends any "sanitization" of evidence by the prosecution does not amount to a Brady violation. Accordingly, the Commonwealth asserts, appellee did not prove the timeliness exception applies, and the PCRA court was without jurisdiction to rule on appellee's petition, much less grant a stay of execution and a new penalty phase.

The Commonwealth also suggests the PCRA court attempted to circumvent a valid death sentence and undermine the integrity of this Court's ruling in appellee's first PCRA appeal. The Commonwealth refers to the ordering of what amounted to additional discovery to supplement appellee's inadequate petition, the court's lengthy examination of the trial prosecutor after PCRA counsel finished his examination, and the admission of "court exhibits" sua sponte, later basing its "governmental interference" decision on one of its own exhibits. In sum, the Commonwealth contends the PCRA court "went to great lengths to expand the record, to reshape [appellee]'s claim, and to limit the Commonwealth." Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution, 10/2/12, at 12. The Commonwealth, therefore, requests we vacate the stay of execution and the grant of a new penalty phase.

Appellee argues the PCRA court's timeliness findings were supported by the record and devoid of legal error. While appellee admits he had prior knowledge of Norwood's sexual orientation, he contends such prior knowledge is critically different from evidence of homosexual ephebophilia and sexual abuse of other teenage males. He distinguishes the failure to present the defense of rage at trial, his 1998 ineffectiveness claim, from the inability to present Norwood as unsympathetic, and repeats that knowledge of homosexuality is not the same as knowledge of homosexual ephebophilia, insofar as it relates to the ability to paint an unsympathetic picture of Norwood.

Appellee argues he met § 9545(b)(1)(i)'s exception because the Commonwealth interfered with his ability to proffer this particular Brady claim, and that he exercised due diligence by presenting the claim within 60 days of obtaining the facts on which the claim was based. Further, appellee asserts a PCRA petitioner's previous knowledge of a fact applies only to § 9545(b)(1)(ii)'s newly-discovered evidence exception, not § 9545(b)(1)(i), alleging the Commonwealth is required to disclose evidence in its

possession even if the defense has previous knowledge or other information about that fact, and the failure to disclose such evidence violates Brady, constituting governmental interference with the ability to present a Brady claim.

Our examination of the three omissions alleged leads to the inescapable conclusion that appellee is not entitled to relief. The missing reports were found to be relevant to Norwood's character, but the failure to explore or exploit that character was not a result of governmental interference — there is abundant evidence appellee knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present him as unsympathetic before the jury. Appellee himself was a teenage male admittedly engaged in homosexual acts with Norwood. Although he denied any involvement in the crime at trial, evidence included his plan to extort Norwood by threating to expose him for being a homosexual, and statements in which Draper and appellee taunted Norwood for "liking boys" while they were beating him. N.T. Trial, 1/22/86, at 667-68; N.T. Trial, 1/23/86, at 813-14; see also N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 2, 9/24/12, at 13. Draper testified at trial that appellee told him Norwood was a homosexual. N.T. Trial, 1/23/86, at 814. We agree with the courts that have previously considered appellee's claims based on sexual orientation — there is no reasonable conclusion that the result of a trial for this horrific crime would have been different had the missing information been provided as appellee would have liked.

Further, evidence offered at appellee's first PCRA hearing in 1998 demonstrated the extent of available knowledge of Norwood's sexual appetites. At that proceeding, counsel offered three expert witnesses, all of whom testified appellee and Norwood were in a homosexual relationship in which appellee was abused by Norwood; they suggested the murder was an "enraged killing" in response to the sexual abuse. See N.T. PCRA Hearing, 4/8/98, at 106, 115, 156-59, 186; N.T. PCRA Hearing, 4/9/98, at 360-61, 375-76;

N.T. PCRA Hearing, 4/13/98, at 540, 542-44, 551-54, 569-70. Additionally, appellee's high school teacher, who was also a private psychotherapist, testified Norwood molested young boys, including appellee, and he learned this information from several people in early 1997. N.T. PCRA Hearing, 4/8/98, at 226-33. Appellee's friend, Donald Fisher, who was also in a homosexual relationship with appellee for approximately five years, testified appellee and Norwood began a homosexual relationship when appellee was approximately 15 years old, which lasted a few years, and Norwood was abusive, liked to inflict pain, and enjoyed having sex with teenage males. N.T. PCRA Hearing, 4/13/98, at 597, 602-05, 617. Fisher also testified appellee would engage in homosexual acts with Norwood for money, alcohol, and other gifts. Id., at 617-18. Fisher learned this information not only from observing the relationship between appellee and Norwood but also because appellee told Fisher. Id. Additionally, the defense stated throughout the hearings that its mitigation witnesses were offered to show Norwood molested young males and to demonstrate trial counsel's ineffectiveness in investigating the homosexual relationship between appellee and Norwood and the abuse involved in that relationship. See N.T. PCRA Hearing, 4/8/98, at 235-37; N.T. PCRA Hearing, 4/13/98, at 603.

Appellee's prior knowledge was also evident at his federal habeas corpus proceeding, during which he alleged Norwood was a closeted homosexual from whom he could extort cash by threatening to expose Norwood's secret to his wife. Williams, 637 F.3d at 200. Analyzing the record from appellee's first PCRA proceeding, the Third Circuit noted appellee and Norwood began their homosexual relationship when appellee was approximately 13 years old. Id., at 229. The court stated Norwood was physically abusive toward appellee, once allegedly beating him with a belt. Id., at 229-30. The federal district court also elicited testimony from appellee's first PCRA proceeding showing Norwood was a homosexual with whom appellee had sex in exchange for

money, drugs, and gifts. See Williams v. Beard, 2007 U.S. Dist. LEXIS 41310, at *106 n.32 (E.D. Pa. May 8, 2007).

The PCRA court itself acknowledged appellee's arguments from the 1998 PCRA hearing supported his prior knowledge, stating appellee "elicited evidence from [] Fisher that [] Norwood was very degrading and he liked to have sex with kids. However, the current claim does not rest solely upon that evidence." See N.T. PCRA Hearing, 9/28/12, at 21. The court also noted the defense, at the time of trial, indeed had information suggesting Norwood was a homosexual — a statement from a witness disclosing appellee told him Norwood "'was a homosexual and was the type to pay people.'" Id., at 27-28. Appellee's PCRA counsel also referenced his prior knowledge at the hearings. See N.T. PCRA Hearing, 9/10/12, at 24 ("[W]e tried to present in prior proceedings evidence about the sexual abuse by [] Norwood of [appellee.]").

And quite tellingly, Draper's affidavits established he knew appellee and Norwood were in a homosexual relationship — "[appellee] had also told me that Norwood was gay" and during the murder, "[appellee] was yelling 'so you like boys, so you like boys' as he hit Norwood" — and appellee told Draper the murder was about the homosexual relationship. Draper's Affidavit, 9/11/12, at 2-4. Draper confirmed appellee's prior knowledge of Norwood's homosexual proclivities repeatedly in his PCRA testimony. See N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 1, 9/24/12, at 88, 93, 96; N.T. PCRA Hearing Vol. 2, 9/24/12, at 12-13.

The evidence alleged to comprise the Brady violation does not include information unknown to appellee, or information he would have been unable to find on his own. The "kidnapping" story told by Norwood's wife indicates that a probably untruthful story was told to her, but nothing more. The PCRA court apparently read between the lines and presumed the story was a lie to hide Norwood's homosexuality from his wife. And

although this story was omitted from the wife's statements in the 1984 police activity sheet, it was disclosed with the pastor's statements in the same sheet. That is, appellee was already aware of this story, whatever its value, through other means. See Reverend's Disclosed Statement, Exhibit C-2, PCRA Hearing, 9/20/12, at 5. Since appellee had it, the government did not interfere with his ability to obtain it.

The pastor's suggestion that he suspected Norwood may have been a homosexual would hardly have surprised appellee, who knew that for years. The government did not keep appellee from ferreting out the reverend, even if his opinion might have been admissible. The pastor's report that he once received a complaint alleging Norwood propositioned a teenage male would have been equally unsurprising. These allegations confirmed what appellee already knew — Norwood was a homosexual with attraction toward teenage males, like himself.[9] There simply is no surprise in this revelation, no new information or insinuation that only now suggests Norwood might be made to look "unsympathetic."

The third "interference" involves nondisclosure of handwritten notes of the trial prosecutor; the PCRA court concluded they recounted a specific instance of homosexual ephebophilia. In toto, the notes read, "[N]ot true — Mrs. House — son in play — Ronald — 16 yrs.[sic] — touched on privates — I don't do that — nobody wd [sic] have to know — brought boy home [and] asked him not to say anything @ [sic] the — he stopped coming to church — disappeared — never verified it — 29 yrs. [sic] — 1st X [sic] — never heard from others @ [sic] possible incidents." See Exhibit Court-2, PCRA Hearing, 9/20/12, at

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[9] The reverend refused to make these statements in writing but related them to police in confidence. He stated, "[H]e himself handled the matter internally and the complaint never went any further than that." See Police Activity Sheet, Exhibit P-24, PCRA Hearing, 9/20/12.

2. The court sua sponte admitted these cryptic notes into evidence and used them to question the trial prosecutor.[10]

These murky notes, if decipherable with any degree of confidence, do not indicate the origin or veracity of their content; they do not indicate whether the notes were written during a witness interview, much less who was being interviewed. Indeed, they start with the notation "not true." They do not mention Norwood, whose connection to the notes we are asked to insinuate. One could infer they involve the incident omitted from the pastor's statements in the 1984 police activity sheet, where a mother told of Norwood's propositioning her teenage son. However, next to appellee's own evidence at the 1998 hearing, it adds little or nothing whatsoever to the information available and already presented. The ability to pursue the mitigating tactic of making Norwood appear unsympathetic was not created by these notes.

Lastly, we note a measure of bootstrapping in appellee's argument. It is difficult to conclude appellee learned something new from Draper's latest affidavit, as Draper's information was derived from appellee's own statements to Draper prior to and at the time of the murder. Further, Draper's suggestion that appellee was enraged at the time of the murder depends on Norwood's prior abuse of appellee, which necessarily establishes appellee's knowledge of Norwood's proclivities before trial. Thus, any failure to previously raise this claim was not the result of governmental interference. See Commonwealth v. Grant, 813 A.2d 726, 730 (Pa. 2002) ("[N]o Brady violation occurs where parties had equal access to the information or if the defendant knew or could have

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[10] Although the Commonwealth contends the PCRA court violated Pa.R.Crim.P. 902(E)(1) in the "Statement of the Case" section of its brief, see Commonwealth's Brief, at 19, the Commonwealth does not raise a discovery issue on appeal; thus, we will not address discovery matters. See Pa.R.A.P. 302(a).

uncovered such evidence with reasonable diligence." (citation omitted)); see also Commonwealth v. Morris, 822 A.2d 684, 696-97 (Pa. 2003).

Like appellee's failed effort to establish a timeliness exception, his Brady claim provides no grounds for PCRA relief because the claim is inapposite to the necessary materiality inquiry. The United States Supreme Court has never held Brady materiality is measured in terms of "effects on the defense strategy." See Commonwealth v. Weiss, 81 A.3d 767, 810-11 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin, J.). Further, Brady does not permit a defendant to shield himself from his prior perjury at trial. See id., at 811-13.

Appellee's Brady theory suggested that had he received additional information about Norwood's homosexual proclivities, his defense would have learned his actual motive for the murder, i.e., rage over being sexually abused by Norwood, which, in turn, would possibly lead to a new strategy where appellee does not perjure himself and Norwood is portrayed unsympathetically. Yet, at the time of trial, appellee was aware of potential witnesses and information that would establish Norwood's homosexual attraction to teenage males. Appellee could have used his prior knowledge and his counsel's due diligence to obtain additional information and witnesses to support a different trial theory than that presented. He could have argued Norwood's homosexual proclivities developed into sexual abuse, leading to rage and ultimate murder of Norwood. He could also have created a portrait of Norwood consistent with that now proffered. However, appellee chose not to do so.

Instead, appellee perjured himself at trial, testifying he did not know the victim, had never seen him before, took no part in the murder, and had no reason to be angry with him or wish to harm him. The defense he chose to present disclaimed knowledge of Norwood, which is antithetical to what he knew and could have presented — evidence

that showed Norwood as a molester, which may have led to establishing a motive of rage, or evidence allowing him to depict Norwood as an unsavory character and sexual predator. Given the choice of defense, such strategies were not relevant.[11] Given the details of appellee's crime, showing the jury the victim was "unsympathetic" was not a plan that was likely to cause reciprocal sympathy for the man who bludgeoned him and incinerated his body. Regardless, this alleged "sanitized information" claim, coupled with the possible effect on appellee's defense strategy, lacks any basis under Brady, as it is neither exculpatory nor material. See Weiss, at 810-13 (Castille, C.J., concurring, joined by Eakin, J.). In sum, the Commonwealth did not obstruct appellee's ability to present Norwood as unsympathetic. Appellee had prior knowledge of the information on which he based his Brady claim, and could have presented the claim much sooner — prior to trial or at any time over the last 20 years. Because appellee's theory was built on perjury, and the information on which he relied was not exculpatory, the PCRA court erred in finding his claim material under Brady. Accordingly, the record does not support the PCRA court's finding appellee established his burden of proof regarding the "governmental interference" exception. See Abu-Jamal, at 1268 (citation omitted). Because the PCRA court was thus without jurisdiction to consider the merits of this petition, see Hawkins, at 1252 (citations omitted), we vacate the court's order, dismiss this petition as time-barred, and reinstate the judgment of sentence of death. The Prothonotary is directed to transmit the complete record in this case to the Governor pursuant to 42 Pa.C.S. § 9711(i).

Order vacated; petition dismissed; judgment of sentence reinstated.

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[11] Trial counsel indicated at a hearing on appellee's post-sentence motions that he was left with using appellee's youth as a potential mitigating factor — since appellee provided him little, if any, assistance, he was frustrated in efforts to present a compelling group of character witnesses on his behalf. See N.T. Post-Sentence Motions, 4/24/87, at 21-27.

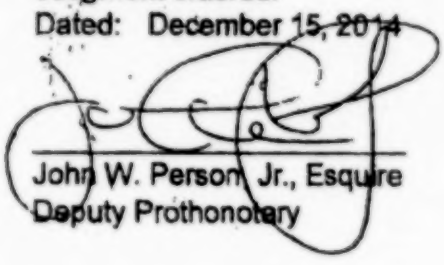
Jurisdiction relinquished.

Mr. Chief Justice Castille and Messrs. Justice Baer and Stevens join the opinion.

Mr. Chief Justice Castille files a concurring opinion.

Mr. Justice Saylor and Madame Justice Todd concur in the result.

Judgment entered:
Dated: December 15, 2014



John W. Person, Jr., Esquire
Deputy Prothonotary

[J-82A-2013 AND J-82B-2013] [MO: Eakin]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 668 CAP
Appellant	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County, Criminal Division, entered on September
v.	:	28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution
TERRANCE WILLIAMS,	:	
Appellee	:	SUBMITTED: September 18, 2013
COMMONWEALTH OF PENNSYLVANIA,	:	No. 669 CAP
Appellant	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County, Criminal Division, entered on September
v.	:	28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution
TERRANCE WILLIAMS,	:	
Appellee	:	SUBMITTED: September 18, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: December 15, 2014**

I join the Majority Opinion. Indeed, in my view, both the Brady[1] claim appellee initially raised, and the Brady claim later uncovered by the PCRA[2] court and upon which

[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

the court granted relief, are time-barred and frivolous. I write separately to expand upon the Majority discussion, and to address the important responsibilities of the PCRA trial courts in serial capital PCRA matters, an issue brought into stark relief by the extraordinary, and unauthorized, measures undertaken by the PCRA court in this case.

Preliminarily, with respect to the latter concern, I note that this is a case involving a **fourth** PCRA petition filed by federal lawyers only after appellee was denied federal *habeas corpus* relief. The fourth petition was time-barred on its face – offering a new, recanting witness (a friend and cohort of appellee) for the same "facts" and theory appellee had long-known and already litigated – and was blatantly frivolous, filed by the FCDO[3] in a transparent effort to induce further delay. Rather than decide the claim actually presented in the efficient manner this sort of last-ditch capital litigation requires, the court below unfortunately strayed from its institutional duties. In the process, the PCRA court: ignored the strictures of PCRA jurisdiction and the appropriate parameters for discovery procedures and evidentiary hearings in serial petition matters; misapprehended what Brady discovery encompasses; misapprehended the substantive law concerning Brady materiality; and, most troubling, lost sight of its role as a neutral judicial officer. As a result, a warrant of execution was enjoined by a trial judge for no valid reason, on the basis of a frivolous fourth PCRA petition, leaving insufficient time for this Court to timely review the judge's injunction of the Governor's warrant.[4]

The PCRA court per the Honorable Teresa Sarmina, justified its actions based on what it viewed as gamesmanship by the Commonwealth in allegedly withholding

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[3] Federal Community Defender's Office.

[4] Appellee cross-appealed the order below, presumably to the extent the PCRA court denied his other claims, but later discontinued that appeal by praecipe. See 673 CAP.

relevant information from appellee. If trial level prosecutorial "gamesmanship" is revealed and is relevant, it obviously warrants notation and condemnation. But, to be relevant in a case involving a fourth PCRA petition raising a Brady claim, the petition would have to be proven timely (to vest jurisdiction), and the uncovered Brady claim would need to possess merit, which both the claim raised in this petition, and the different claim found by the PCRA court, do not. Furthermore, in the Brady arena, before condemning officers of the court, the tribunal should be aware of the substantive status of Brady law both at the relevant time and today.[5] And, just as a preview: Brady does not authorize searching through the government's files – not at trial, not on collateral attack, and especially not on a fourth PCRA petition. This case presents a supervisory issue concerning the manner in which trial courts handle serial petitions in capital cases that I believe requires highlighting and disapproval.

As noted, I will write also to expand upon why the claim raised by appellee, as well as the different claim discovered by the PCRA court, misconceives Brady.

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[5] To the extent the alleged non-disclosures here involved matters found when the PCRA court searched police files, it should be stressed that the investigation and prosecution (murder in 1984; conviction in 1986) preceded, by many years, the U.S. Supreme Court's decision in Kyles v. Whitley, 514 U.S. 419, 437 (1995), which first held that the prosecution's Brady obligation extends to exculpatory materials known to others acting on the relevant government's behalf, including the police. Prior to Kyles, in Pennsylvania, the law was that prosecutors were not responsible for the content in police files. See Commonwealth v. Burke, 781 A.2d 1136 (Pa. 2001) (abrogating prior cases). The consequent distortions in this case are not unusual in this unique area of law where cases continue to be litigated decades after trial, and federal lawyers contend that new rules or innovative rules govern collateral attacks on old cases. Any finding of misconduct respecting this nearly thirty-year old case, then -- and I do not dispute the concern, even if there was zero exculpatory material to support a viable Brady claim – must be tempered by awareness of the governing law at the relevant times, as well as the fact that the Brady focus is not on any evidence, but only on exculpatory evidence and materiality.

I. **The FCDO Agenda as Necessary Prologue**

As I noted in a recent case involving a retroactive Atkins[6] claim raised by the FCDO: The FCDO's significant federal resources, "represented by its cadre of lawyers and roster of experts, are deployed throughout the Commonwealth; individual trial courts, and county prosecutors for that matter, who see only the occasional capital case, may be unaware of the bigger picture, and the strategy at work. This extraordinary shadow capability of the FCDO, and its demonstrated tactics, give me additional pause...." Commonwealth v. Hackett, 99 A.3d 11, 40-41 (Pa. 2014) (Castille, C.J., concurring). It has only recently emerged just how pervasive a presence the FCDO has made itself in Pennsylvania capital cases. Almost invariably without legitimate court appointment, and without any Pennsylvania authority's approval or role of oversight, this "private" group of federal lawyers pursuing an obstructionist anti-death penalty agenda have essentially anointed themselves as a statewide, *de facto* capital defender's office. Common tactics of the FCDO include multiple attempts to delay and obstruct cases, as well as attempts to unsettle and undermine Pennsylvania law. See generally Commonwealth v. Spotz, 99 A.3d 866 (Pa. 2014) (Single Justice Opinion on Post-Decisional Motions by Castille, C.J.) (collecting cases and tactics).

One common tactic is that, immediately after one round of review fails, the FCDO "discovers" a new claim and initiates a new round of delay-inducing review. See, e.g., id.; Commonwealth v. Porter, 35 A.3d 4 (Pa. 2012); Commonwealth v. Abdul-Salaam, 996 A.2d 482 (Pa. 2010). In this case, that is exactly what the FCDO did. Appellee already had a full direct appeal, three rounds of PCRA review and appeal, and a full round of federal *habeas corpus* review and appeal when the FCDO happened upon

[6] Atkins v. Virginia, 536 U.S. 304 (2002).

"new" evidence and filed this fourth PCRA petition which, in fact, merely reiterated the same evidence and a theory it had already litigated and which was found to be meritless. The PCRA court below should have decided the claim actually presented to it, while maintaining a proper perspective. And, it has become apparent that PCRA courts throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group, to ensure that the FCDO does not turn PCRA proceedings, and in particular serial proceedings, into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow.

II. The Brady Issue Raised by the FCDO was Time-Barred and Frivolous

This fourth PCRA petition was filed by the FCDO in March of 2012, immediately after appellee's federal *habeas* attack on his conviction failed. Appellee's final appropriate prospect for relief was through mercy: the clemency process. The FCDO was appointed to represent appellee for purposes of pursuing state clemency. Nevertheless, the FCDO proceeded to file yet another PCRA petition.

The FCDO alleged prosecutorial suppression of information allegedly provided to the police and the prosecutor during witness preparation sessions by appellee's friend and cohort-in-murder Marc Draper – who was convicted for his own role in the murder and is serving life in prison, who testified contrarily at appellee's trial, and has nothing to lose by now lying for his friend – and the Reverend Charles Poindexter. Draper claimed that he had told the arresting officers, as well as the prosecutor, that the victim, Amos Norwood, was a homosexual, that Norwood and appellee were involved in a sexual relationship, and that the murder was about that relationship. What was obfuscated by Draper and the FCDO was that this information could only have been learned through appellee's own communications with Draper, since appellee obviously knew his "true"

motivation; or else it was just Draper's irrelevant opinion. Draper further claimed that police told him to testify that the motive for the murder was robbery. Appellee also included a "declaration" from Poindexter (who had testified for the Commonwealth at the guilt phase of trial), claiming he had learned from police that the victim would sometimes meet gay men in a house or an apartment.

From this information, the FCDO constructed a claim that the Commonwealth suppressed "exculpatory" evidence of the relationship between appellee and the victim and appellee's supposed "true" motivation for the murder – again, as if appellee himself did not know his own true motivation – which could have been used to rebut elements of first-degree murder and to undermine the death penalty. The argument was akin to a "bad faith" argument, *i.e.*, the Commonwealth had argued that a churchgoing man was robbed and murdered by appellee and Draper, despite knowing that appellee may have had a different relationship with the victim, and a different motivation that he was keeping to himself.

As the Majority explains, the information alleged in this fourth petition not only was obviously known to appellee, but it also was irrelevant to the trial proceedings (the focus of Brady) because the defense – offered through appellee's testimony – was one of innocence and non-involvement. In short, appellee chose to lie. In addition, the Draper and Poindexter statements – conveniently secured by the FCDO only after losing in federal court – rehashed the same information concerning the victim's character and appellee's "true" motivation for the murder already litigated in the first PCRA proceeding. Thus, the FCDO's last-ditch Brady claim consisted of evidence already known to appellee, a claim already litigated by appellee, and a contrary defense theory springing from an admission that appellee perjured himself at trial. The PCRA court should have taken the frivolous issue as the FCDO presented it and dismissed it

as time-barred. The court inexplicably did not; and instead, the frivolous issue now before this Court is a different Brady claim never raised by appellee until prompted to do so by the PCRA court, after the issue was uncovered by the PCRA court itself only by losing sight of fundamental precepts, including its role as neutral arbiter.

III. PCRA Court's "Discovery"

A PCRA court is without jurisdiction when a serial petition is filed (assuming it is filed more than one year from the date the judgment of sentence became final, as it was here) unless it falls within one of three limited exceptions. 42 Pa.C.S. § 9545. In all PCRA petitions, the burden is on the PCRA petitioner to establish an exception to the one-year jurisdictional time-bar, before the court can act. Moreover, the rules governing discovery in PCRA matters explicitly state that no discovery is permitted for first counseled petitions except "upon leave of court after a showing of good cause," Pa.R.Crim.P. 902(E)(2); while in serial cases such as this one, discovery is not permitted "except upon leave of court after a showing of exceptional circumstances." Rule 902(E)(1). These are this Court's Rules: not niceties to be done away with perhaps because of some unease with capital cases.

Nothing in the Rules authorizes a PCRA court to demand the government's thirty-year-old files and for the court itself to go searching for information and new claims – all without jurisdiction being established. This is true whether the case is a capital case or not – the difference of a death sentence does not create jurisdiction, or derivative power, where it does not exist.

These Rules are neither arbitrary nor mere aspirations. The PCRA Rules square with Brady, which does not command an open-file policy, or a "sporting system" of discovery. See Brady, 373 U.S. at 90-91. Thus, even where, unlike here, serial petition

jurisdiction is established and the petitioner demonstrates exceptional circumstances to warrant some form of discovery, such orders do not properly encompass simply seizing and rummaging about in the government's files.

> [T]he [U.S. Supreme] Court has noted that the duty imposed upon the prosecution under Brady is a limited one. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one"); see also Kyles, 514 U.S. at 436–37, 115 S.Ct. at 1567 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.... We have never held that the Constitution demands an open file policy ...."). This Court has also recognized Brady's limited requirements, and has noted that Brady does not grant a criminal defendant unfettered access to the Commonwealth's files. See Commonwealth v. Edmiston, 578 Pa. 284, 851 A.2d 883, 887 n. 3 (2004) (defendant has no general right under the Constitution or *Brady* to search Commonwealth files); Commonwealth v. Williams, 557 Pa. 207, 732 A.2d 1167, 1176 (1999) ("[T]he Commonwealth is, in the first instance, the judge of what information must be disclosed.... 'Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.' ") (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987)); Commonwealth v. Counterman, 553 Pa. 370, 719 A.2d 284, 297 (1998), cert. denied, 528 U.S. 836, 120 S.Ct. 97, 145 L.Ed.2d 82 (1999) (Brady is not a general rule of discovery in criminal cases).

Commonwealth v. Lambert, 884 A.2d 848, 854 (Pa. 2005).

This Court's Rules, likewise and for similar good reason, do not empower a PCRA judge to hold evidentiary hearings in a serial petition case in advance of a demonstration of jurisdiction. Appellee already had five full rounds of review. Hearings are appropriate – after jurisdiction is established – only if there has already been an actual demonstration of a genuine issue concerning any material fact. See Pa.R.Crim.P 908(A)(2), 909(b)(2). A new and different Brady claim discovered by the PCRA judge's own unauthorized, and unlimited, "investigation" – conducted after a serial PCRA petition is filed and not yet assessed for jurisdiction – cannot operate to

render the petition timely when filed. Likewise, information obtained from the government's files after the PCRA court improperly ordered seizure of the information without foundation cannot retroactively operate to validate the improper serial petition "discovery" order (or "seizure" order, in this case) in the first instance.

During one of the earliest hearings after an execution date was set in this matter, the PCRA court recognized that Draper's affidavit was insufficient to warrant an evidentiary hearing. Nevertheless, the court essentially directed appellee to procure a third affidavit from Draper to see whether appellee could establish a strong showing of success on the merits which, in the mind of the court, was necessary in order to warrant an evidentiary hearing with a death warrant pending. N.T., 9/10/12, at 86-87. Following submission of the third affidavit, the court then ordered an evidentiary hearing to receive testimony from Draper and the trial prosecutor (who was no longer with the District Attorney's Office). Prior to this hearing, the court entered an order prohibiting the parties from communicating about the case with Draper or the trial prosecutor and further ordered the trial prosecutor to bring any documents in her possession related to the case to the evidentiary hearing. The court then ordered the prosecutor's office to give access to the case files to the trial prosecutor, via an e-mail the judge sent to the parties.

A subsequent e-mail from the court took the even more lawless step of essentially opening the prosecutor's files to appellee's counsel, as the judge directed that appellee was permitted to review any of the documents reviewed by the trial prosecutor. Then, in another e-mail sent on Saturday, September 22, 2012, the court's clerk directed the Commonwealth to secure the police department's homicide files in

this case and the Herbert Hamilton murder case[7] because "the judge wants to review everything in the possession of the police department about these two cases." See Attachment to "Commonwealth's Motion to Complete the Record," filed 10/26/12. The PCRA court's examination of these files provided the basis for the examination of the witnesses at the evidentiary hearing, including an extended cross-examination by Judge Sarmina herself.

Ignoring the jurisdictional time-bar and the rules of procedure, and all in a truncated death warrant time-frame leaving little time for appellate review in two court systems, the PCRA court essentially seized the files of the Commonwealth and the police for no legitimate reason (and certainly not based upon the required actual defense showing of exceptional circumstances), independently reviewed the materials, and then used that which was uncovered by the court to examine witnesses at an evidentiary hearing again scheduled for no legitimate reason. The court also entered some of the documents into the record on its own without any motion or prompting by appellee. Only thereafter, during the September 25th hearing, did appellee ask permission to amend the fourth PCRA petition to include the new allegations raised by the documents the judge had found, and the court immediately granted the request, reasoning that Chapter 900 of the Rules of Criminal Procedure – the same chapter containing the Rules respecting discovery and evidentiary hearings that were of no concern to the judge – supposedly indicated that there should be a liberal ability to amend, "even if it is at this late stage." N.T., 9/25/12, at 76.

Unfortunately, the PCRA court apparently allowed itself to be compromised by the fact that this was a capital case that was proceeding under an execution warrant.

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[7] Herbert Hamilton, another older man with whom appellee had a sexual relationship, was the first person appellee murdered.

But, that is what happens, thirty years on, after a condemned capital petitioner has already exhausted five full rounds of review, and his federal lawyers try another longshot at delaying the case. Also, in taking these extreme, activist measures, the court cited a belief – proper enough in some spheres, and thus recognized in specific doctrines – that "death is different." The judge added: "This is not any regular, old PCRA, including in a non-capital case." N.T., 9/14/12, at 69. No, it was not an ordinary case, but not for the reason cited by the court: it was a last-ditch fourth state collateral petition, filed by the FCDO no less, after federal review had concluded, rehashing old claims that just happened to involve a two-time murderer finally facing the execution of his sentence.

This case demonstrates that the "difference of death" when reduced to an unmoored slogan causes mischief. The slogan does not create PCRA jurisdiction, and jurisdiction must be proven before the PCRA court can act. The difference of death is not a ground for ignoring this Court's Rules of Procedure, which specifically apply to – and in many instances exist specifically because of – capital cases. The difference of death also does not alter a trial court's crucial role as a neutral arbiter to pass upon the timeliness, and if timely, the merits of the claims that a serial PCRA petition actually raises. Five Ninth Circuit jurists recently commented on the abuse of the "death is different" notion in a dissent, explaining that the rule of law must be paramount:

> Whatever they are, motivations are beside the point. We should follow the law. Instead, we lay flame to orderly case-processing rules, comity due to state court judgments, and principles of finality. "[Fire's] real beauty is that it destroys responsibility and consequences. A problem gets too burdensome, then into the fire with it." Ray Bradbury, *Farenheit 451* 109 (Simon & Schuster 2012). We should be more cautious.

Henry v. Ryan, 766 F.3d 1059, 1072 (9th Cir. 2014) (Tallman, J., dissenting, joined by O'Scannlain, Callahan, Bea, & Ikuta) (dissenting from grant of *en banc* review in case

where time for Circuit reargument had long passed, and U.S. Supreme Court had already denied *certiorari*). Ultimately, the PCRA court here lost sight of its limited, albeit crucial, role.

As a consequence, the PCRA court steered its own course away from the actual Brady claim presented in this time-barred serial petition; and the Brady claim forming the basis for the penalty phase relief the PCRA court granted could not retroactively establish jurisdiction so as to justify the lawless discovery and evidentiary hearing that had already occurred per the court's *sua sponte* directives. To make matters even worse, the claim the court discovered on its own was simply a different, frivolous Brady claim.

IV. Brady Law

The 1984 murder here was appellee's second murder. His first murder victim, Herbert Hamilton, was another man with whom he had a sexual relationship, a relationship appellee denied. At the trial in this case, appellee testified to his absolute innocence, claiming he did not even know the victim. As all now agree, this sworn testimony was a lie since appellee not only knew the victim, but he had an ongoing homosexual relationship with him. But, it is the story appellee elected to tell the jury in the hopes, however desperate, of an acquittal. It is not the first time a criminal defense was premised upon a lie, but it is a defendant's right to pursue the defense he chooses (even if it risks a subsequent perjury prosecution, which is hardly a disincentive to a serial murderer in appellee's circumstances).

The new Brady claim discovered by the PCRA court's efforts involved "dirt" about the victim: that he was a "homosexual ephebophiliac" who had sexual encounters with male teenagers. Specifically, as explained by the Majority, the claim was that

information that the victim was a homosexual ephebophiliac could have been employed to paint an unsympathetic picture of the victim at the penalty phase. Majority Slip op. at 17. Nothing in the death penalty statute, however, makes slander about a victim a relevant consideration. The death penalty statute does not recognize an exception if the murder victim was a sexual deviant, or even a convicted sex offender; and smearing the victim's character would not rebut the two aggravators the jury found: the commission of a felony (robbery) along with the murder, and the significant history of violent felony convictions, which included the murder of Hamilton, and a Christmas Eve, home invasion gunpoint robbery of an older couple – where appellee pressed a rifle to the woman's neck and threatened to blow "her fucking head" off, and then fired multiple shots into the wall. Nor would such evidence be probative of a mitigating circumstance. See Commonwealth v. May, 898 A.2d 559, 566 (Pa. 2006) (testimony designed only to smear murder victim's character not relevant; noting as "apt" trial court's analysis that: "it's just as illegal to kill the devil as it is to kill a saint"). And, when the defendant takes the stand and swears he had nothing to do with killing the victim, and did not even know him, it clearly limits his penalty phase options respecting mitigation arising from "the circumstances of the offense."

The linking assumption depends upon a pet Brady theory the FCDO has been raising recently, *i.e.*, that Brady is violated by non-disclosures which, though involving information neither exculpatory nor material in and of itself, in hindsight might have been used by trial counsel to keep the defendant from testifying and perjuring himself, thereby altering the focus of the necessary Brady materiality inquiry. See Commonwealth v. Weiss, 81 A.3d 767 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin J.) (further discussed and quoted *infra*). In the iteration posed here, the theory goes something like this: had additional information about the victim been disclosed, the

defense would have learned appellee's "real" motive for murder (again, as if appellee did not know his motive), and perhaps trial counsel could have convinced appellee not to take the stand and lie, thus opening the door to an attack-the-victim defense at the penalty phase. Even setting aside the irrelevancy of bad character information about a murder victim, Brady does not embrace this sort of perversity, a theory that rewards the defendant's trial perjury.

Furthermore, even if the PCRA court found something "unsporting" about the government's conduct revealed in the government's files that the court seized, and even if evidence of poor "sportsmanship" in discovery angered the judge, that is not the basis for a Brady claim. What matters is the legal point, made by the Majority, that there was nothing exculpatory or material in this information.[8] Appellee always knew of the

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[8] In concisely summarizing why the PCRA court erred in finding that appellee's reconfigured-by-the-PCRA-court claim did not qualify under the governmental interference exception, based upon information appellee himself had known before trial, and supplemental information which he secured for use in a prior PCRA petition over fifteen years before, the Commonwealth succinctly explains:

> When, at trial, defendant considered it in his interest to deny any sexual relationship with his victims so as to distance himself from their deaths, he made the strategic decision, **independent of any information in the government's possession**, to do so. And when that did not work, and he decided it was in his interest to instead claim in his first PCRA petition that he killed the victims [both here and in the Hamilton case] because they sexually abused him, he had no difficulty marshalling evidence **outside the government's possession** to support that version of events. At no point was his ability to defend against the charges, or to present any claim, constrained by the actions of the trial prosecutor or any other government official. Consequently, his untimely fourth PCRA petition, which he filed more than twenty years after his judgments of sentence became final, did not satisfy the governmental-interference exception to the one-year filing deadline. His petition was time-barred, and the PCRA court's order purporting to grant relief was a jurisdictional nullity that should be reversed.

(...continued)

victim's supposed proclivities; again, the current claim is just another version of the claim raised and litigated by the FCDO fifteen years ago. Nevertheless, the PCRA court drew a legal conclusion that the evidence respecting the victim was subject to Brady disclosure before the 1986 trial; and, if only the prosecution had disclosed non-exculpatory information already known to appellee about the victim's character, it may have changed appellee's guilt phase decision to testify; and, the theory goes on in speculation, may have altered the outcome of the penalty proceeding. See Appellee's Brief, at 29-30 (quoting PCRA court opinion).[9] The notion that this sort of evidence, in the context of a trial where appellee testified and denied any involvement, warrants Brady-based penalty phase relief, is ludicrous.

As the Majority notes, the U.S. Supreme Court has never held that Brady materiality is measured by the FCDO's effect-on-the-defense-trial-strategy theory; and a serial collateral attack is not the proper place to establish such constitutionally

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(continued...)
Commonwealth's Brief as Appellant, 34 (emphasis original).

[9] In point of fact, appellee never so much as offered to prove that, but for the alleged non-disclosure, he would have presented evidence detailing his ongoing, prior sexual relationship with the victim, and then claimed that the relationship was why he murdered the victim. Furthermore, the decision to testify was defendant's alone; his trial counsel's role was limited to consultation. In this regard, it is notable that, in the prior PCRA proceeding, where appellee litigated the same basic claim, trial counsel testified that he had negotiated a plea deal where appellee would receive life in prison – the best possible circumstance where appellee faced the death penalty, had substantial aggravators, and the fact of the robbery meant that his best, realistic prospect was a conviction for second-degree murder, which carries a mandatory life sentence. Counsel consulted with appellee. But, counsel testified, appellee was adamant that he was not willing to exchange his prayer of a hope for an outright acquittal for a term of life imprisonment. Appellee told counsel he would rather be executed than spend his life in jail. No claim but innocence could lead to acquittal, and appellee decided to go that route by then perjuring himself.

innovative new rules. Moreover, it would be absurd to grant Brady relief upon a claim that would involve rewarding a defendant for his own deliberate perjury at trial. I explained the error in this theory in my Concurring Opinion in Weiss:

> The Brady analysis argued by appellant is erroneous for several reasons. First, the U.S. Supreme Court has never embraced his interpretation. Indeed, appellant's claim to the contrary is premised upon a mischaracterization of United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant states the following proposition as if it were black-letter law: "The proper Brady inquiry asks what 'course that the defense and the trial would have taken had the defense not been misled' and what impact the misconduct had on 'the preparation or presentation of the defendant's case.' Bagley, 473 U.S. at 683, 105 S.Ct. 3375." ... From his assertion that mere effects upon defense preparation, rather than hard evidence, is the measure of Brady materiality, appellant argues his more radical extended rule that he may shield himself from his own prior testimony.
>
> However, Bagley supports neither appellant's "defense effects" root rule, nor his testimonial immunity extension of the rule. Appellant's [FCDO] counsel neglect to note that the Bagley language they cite and quote as governing black-letter law in fact represented the views of only two Justices in Bagley. It is not governing law. I examined and explained the non-precedential effect of this language at some length in my concurring opinion in Commonwealth v. Willis, 616 Pa. 48, 46 A.3d 648 (2012), a direct appeal case. See id. at 674-84 (Castille, C.J., concurring, joined by Eakin and McCaffery, JJ.) (addressing Court's erroneous apprehension of Brady materiality in Commonwealth v. Green, 640 A.2d 1242, 1245 (Pa. 1994)).
>
> Moreover, nothing in the logic of Brady materiality suggests a design to shield a defendant from his prior testimony or perjury. The test for Brady materiality is the same as the test for Strickland [v. Washington, 466 U.S. 668 (1984)] prejudice: whether there is a reasonable probability that the outcome of the proceeding would have been different. See Kyles v. Whitley, 514 U.S. 419, 433-35, 115 S.Ct. 1555, 131 L.Ed.2d 490 (U.S. 1995) (noting that Bagley adopted Strickland formulation for Brady claims). The test, whether for Brady or Strickland, looks to the proceeding that actually occurred and attempts to assess its underlying fairness. See id. at 451, 115 S.Ct. 1555; see also Bagley, 473 U.S. at 678, 105 S.Ct. 3375. The High Court has never held that courts, charged with assessing

Brady materiality by re-examining the trial that occurred in light of previously suppressed evidence, are obliged to diminish the record at that trial. Accordingly, appellant's theory is a non-starter. The expansion, if there is to be one, should come from the High Court.

Second and relatedly, this is a PCRA appeal. An assessment of the fairness of appellant's trial – whether he poses a Brady claim, a Strickland claim, or any other claim – is not measured by minority views in prior decisions or by hopeful predictions of where federal decisional law might someday go; it is measured by the existing law that governs. The only federal decisional law that governs in Pennsylvania is that commanded by the U.S. Supreme Court. ... And, errors in such predictions [of where the law might develop] favoring the defense run the risk of arbitrarily releasing murderers.

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Finally, I believe it is extremely unlikely that the U.S. Supreme Court would adopt a Brady materiality extension ... which would immunize a defendant against the effects of his own trial testimony, much less his own false trial testimony. To borrow from the Strickland jurisprudence from which Brady materiality derives:

> It is true that while the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as Strickland itself explained, there are a few situations in which prejudice may be presumed.... And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. Nix v. Whiteside, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).
>
> Similarly, in [Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)], we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate

> "prejudice" contemplated by our opinion in Strickland.... Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the Strickland test.
>
> Williams v. Taylor, 529 U.S. 362, 391-93, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (citations and footnotes omitted). Cf. Commonwealth v. Cox, 581 Pa. 107, 863 A.2d 536, 556-57 (2004) (Castille, J., concurring) (strong argument to be made that heightened prejudice standard under Lockhart should be applied to ineffectiveness claims with "fundamental substantive issues that would have to be resolved in defendant's favor before relief could be granted"); United States v. Day, 285 F.3d 1167, 1171 (9th Cir. 2002) ("Because a defendant does not have a 'right' to commit perjury without suffering the consequences, the fact that counsel's ineffectiveness gave [defendant] an opportunity to commit perjury does not constitute deprivation of a right; accordingly, this portion of the sentence does not satisfy the prejudice component of Strickland."). Again, in explicating both Brady and Strickland, the High Court has stressed the overriding concern of whether the defendant has received a fair trial. Fairness works two ways, the High Court teaches. When the defendant takes the stand and elects to testify, and then testifies absurdly or untruthfully, I doubt that the U.S. Supreme Court would hold that Brady requires courts to pretend that his testimony never existed.

Weiss, 81 A.3d at 810-13 (Castille, C.J., concurring, joined by Eakin, J.) (footnotes omitted).

For these specific reasons, in addition to those set forth by the Majority on the time-bar and the merits, the new Brady claim fashioned by the PCRA court here provides no grounds for serial petition jurisdiction, much less PCRA relief.

V. Conclusion

The FCDO's agenda and tactics by now should be predictable: this group has been aptly described, by a federal judge, as "gaming a system and erecting roadblocks in aid of a singular goal -- keeping [the defendant] from being put to death." See Abdul Salaam v. Beard, 16 F. Supp. 3d 420, 511 (M.D. Pa. 2014). That gaming is bad

enough; but, what is disheartening here is that the PCRA court became unmoored from its lawful duty. Trial courts faced with serial petitions in capital cases must be vigilant to protect against frivolous claims, and must be aware of their own actual duties; the PCRA judge here was not.

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Criminal Appeals Unit
First Judicial District of PA

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	CP-51-CR-0823621-1984
v.	:	Supreme Court Docket No.: 669 CAP
TERRANCE WILLIAMS	:	
Sarmina, J. November 27, 2012	:	

OPINION

PROCEDURAL HISTORY

On February 3, 1986, a jury convicted Terrance Williams (appellee) of first-degree murder (H-1), robbery (F-1) and criminal conspiracy (F-1) in the killing of Amos Norwood (victim).[1] After a penalty hearing that same day, the jury found two aggravating circumstances,[2] no mitigating circumstances,[3] and returned a verdict of death on February 4, 1986.[4] Appellee filed post-trial motions, which were denied in a formal opinion by the

[1] 18 Pa.C.S. §§ 2502(a), 3701, and 903, respectively.

[2] The two aggravating circumstances found by the jury were that appellee committed the killing while perpetrating a felony and that he had a significant history of felony convictions involving the use or threat of violence to the person. 42 Pa.C.S. §§ 9711(d)(6) and 9711(d)(9), respectively. The Commonwealth introduced evidence of appellee's convictions for burglarizing the home of Hilda and Donald Dorfman, and killing Herbert Hamilton, for which he was tried and convicted of third degree murder in February 1985.

[3] Appellee's trial counsel, Nicholas Panarella, Esquire, presented mitigating evidence of appellee's youth at the time of the crime and his character and record. 42 Pa.C.S. §§ 9711(e)(4); 9711(e)(8). Mr. Panarella did not make any argument with respect to the victim at the penalty phase. Notes of Testimony (N.T.) 2/3/1986 at 1877-81.

[4] On July 1, 1987, appellee was formally sentenced to death on the first degree murder charge, to a term of not less than five nor more than ten years on the conspiracy charge, and to a term of not less than ten nor more than 20 years on the robbery charge. N.T. 7/1/1987 at 72-74. The conspiracy and robbery sentences were to run concurrent with the death penalty sentence, but consecutive to one another.

Honorable David N. Savitt on July 28, 1987,[5] and then the judgments of sentence were affirmed by the Pennsylvania Supreme Court on February 8, 1990. Commonwealth v. Williams, 570 A.2d 75 (Pa. 1990) ("Williams I").

Appellee filed a *pro se* petition pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* on March 24, 1995.[6] The PCRA Court denied the petition on October 20, 1998.[7] On December 22, 2004, our Supreme Court affirmed the PCRA Court's decision. Commonwealth v. Williams, 863 A.2d 505 (Pa. 2004) ("Williams II"). Appellee subsequently filed a second PCRA petition on February 18, 2005, which was dismissed as untimely under 42 Pa.C.S. § 9545.[8] Our Supreme Court affirmed this dismissal, without an opinion, on September 27, 2006. Commonwealth v. Williams, 909 A.2d 297 (Pa. 2006).

In July of 2005, appellee filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. On May 9, 2007, the Honorable Michael M. Baylson denied appellee's petition for writ of habeas corpus pursuant to § 2254, but granted a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(2) with respect to two issues – whether trial counsel was constitutionally ineffective during the penalty phase of trial and whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Williams v. Beard, 2007 U.S. Dist. LEXIS 41310, ** at 182-83. On

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[5] Commonwealth v. Williams, No. 2362-37, slip op. (Pa. Ct. Com. Pl., July 28, 1987). Judge Savitt was the trial judge, and presided over and decided the PCRA petition appellee filed in 1995.

[6] Appellee's current counsel first appeared on appellee's behalf on May 14, 1996, and filed an Amended Petition on December 17, 1996.

[7] Judge Savitt's formal opinion denying this PCRA petition was filed on January 13, 1999. Commonwealth v. Williams, No. 2362-67, slip op. (Pa. Ct. Com. Pl., Jan. 13, 1999).

[8] Commonwealth v. Williams, No. 2362-67, slip op. (Pa. Ct. Com. Pl., May 26, 2005). In this petition, appellee claimed that the accomplice liability instruction allowed the jury to find appellee guilty of first degree murder without finding that he possessed the specific intent to kill.

March 9, 2011, the Third Circuit found that the Batson claim failed on its merits. Williams v. Beard, 637 F.3d 195, 219-20 (3d Cir. 2011). With respect to the ineffective assistance of counsel claim, the Third Circuit held that our Supreme Court's determination that appellee was not prejudiced by trial counsel's constitutionally deficient failure to present the mitigating evidence presented at the 1998 PCRA evidentiary hearings was not an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984).

The present litigation evolved roughly ten months after the Third Circuit's March 9, 2011 decision.[9] On January 9, 2012, appellee's counsel visited Marc Draper (Draper), the co-defendant in the Norwood killing and a principal Commonwealth witness at appellee's trial, while he was serving a life sentence for that killing at SCI-Frackville.[10] Draper signed a declaration pursuant to 18 Pa.C.S. § 4904, in which he stated, for the first time that, during a prep session prior to trial, he told detectives that the victim was a homosexual who was in a relationship with appellee. Declaration of Marc Draper, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court). Draper also stated that the detectives "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." Id. Appellee's counsel returned to SCI-Frackville on March 1, 2012 and obtained another signed declaration from

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[9] Appellee's petition for rehearing in the Third Circuit was denied on July 26, 2011. Appellee then prepared and filed a petition for writ of *certiorari* in the United States Supreme Court. The petition was filed on December 13, 2011 and denied on June 29, 2012 *sub nomine*. Williams v. Wetzel, 2012 U.S. LEXIS 4903 (June 29, 2012).

[10] Draper pleaded guilty to second degree murder before Judge Savitt on February 21, 1986 for his role in the killing of Amos Norwood. He was represented by Harry Seay, Esquire. N.T 2/21/1986 at 1.

Draper. On the basis of those two statements, appellee filed the instant PCRA petition on March 9, 2012 and an Appendix to the petition on July 16, 2012.[11]

On July 24, 2012, appellee filed Petitioner's Memorandum, in which he argued that this PCRA Court should advise Governor Corbett that he need not sign an execution warrant in this case.[12] On July 27, 2012, appellee supplemented his Memorandum with Petitioner's Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution along with an Appendix to that filing. The Commonwealth responded on July 31, 2012, filing a Brief in Opposition to Motion to Stay.

On August 6, 2012, this Court briefly heard argument on the issue raised in appellee's July 24, 2012 Memorandum that this Court should advise Governor Corbett not to sign appellee's execution warrant. However, at the hearing, appellee orally withdrew the request in light of the Commonwealth's representation that Governor Corbett planned to sign appellee's execution warrant three days later, on August 9, 2012. N.T. 8/6/2012 at 4-5. The Governor signed the warrant on August 8, 2012, and scheduled the execution for October 3, 2012.

On August 28, 2012, appellee filed Petitioner's Renewed Motion for Stay of Execution, citing public policy reasons to stay appellee's scheduled execution.[13] On

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[11] Appellee filed his current PCRA petition through counsel, the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO"), who has represented him since 1996. Billy H. Nolas, Esquire, Shawn Nolan, Esquire, Eric Montroy, Esquire, and Jennifer Givens, Esquire entered appearances on appellee's behalf before this Court. Robin Godfrey, Esquire, Cari Mahler, Esquire and Ronald Eisenberg, Esquire entered appearances on the Commonwealth's behalf before this Court.

[12] Judge Savitt having retired, this PCRA matter was officially assigned to this Court on May 23, 2012. Based on the way in which the Post Trial Unit processes the PCRA paperwork, this Court first received the pleadings on or about July 24, 2012.

[13] Commonwealth v. Morris, 771 A.2d 727, 739 (Pa. 2001) ("Morris I") clearly dictates that trial courts do not have discretion to go beyond the corners of 42 Pa.C.S. § 9545(c) when determining whether or not to grant a stay of execution:

September 6, 2012, appellee filed a Motion for Discovery, requesting "any information relating to Marc Draper, Reverend Poindexter, and any informal or formal documentation pertaining to any of Marc Draper's other offenses, including, but not limited to, the Donna Friedman case" from the police homicide file.[14] Petitioner's Motion for Discovery, 9/6/2012 at 5. Additionally, appellee requested the production of exculpatory information contained in the Commonwealth's "secure archive"[15] as well as "any reports or notes made concerning Norwood's sexual relationship or sexual abuse of petitioner or any other child

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(FN cont'd...)

> Given that we have concluded that § 9545(c) does not violate either Article V, § 9 or 10 of the Pennsylvania Constitution and is therefore, within constitutional restraints, we hold a lower court may not exercise its inherent right to grant a stay except within the confines enumerated by § 9545(c). We are mindful of the fact that such a conclusion may seem harsh, especially where death is the ultimate result of the denial of relief in these instances, but we cannot ignore that at some point in the proceedings society's interest in finality becomes overarching. Accordingly, we conclude that a PCRA court is bound by the requirements of § 9545 and can only enter a stay when it has reasonably concluded that such requirements are met.

Despite our Supreme Court's landmark decision prohibiting trial courts from allowing factors beyond the scope of § 9545(c) to enter into the equation as to whether granting a stay of execution is appropriate, appellee's counsel exerted an enormous amount of time and resources to persuade this Court that public policy considerations merited entering a stay of execution. While a statement from the decedent's spouse and support from a myriad of sources might have been pertinent to a clemency proceeding, this Court found appellee's documentary support and oral argument in this regard to be irrelevant and a waste of the Court's time. And the Court agreed with the Commonwealth's position that seeking advisory opinions from the trial jurors as to what their verdict at the penalty phase would have been – if they had been told that the victim had molested appellee – was inappropriate and improper for a number of reasons.

[14] Donna Friedman, a pregnant woman who lived in the Mt. Airy section of the city, was murdered on July 3, 1984. Police were doggedly trying to solve her murder – which remains unsolved to this day – and considered Draper and appellee suspects. In the PCRA evidentiary hearing before this Court, Draper maintained that, on July 20, 1984 – the day he was arrested for his involvement in the Norwood case – police threatened him with the death penalty for having killed Ms. Friedman. N.T. 9/20/2012 (P.M.) at 182-88. He stated that the threat of being charged with the Friedman murder was one of the reasons why he cooperated with police, and why he refrained from speaking about the Norwood murder over the years. Id. at 188-89. This Court found that testimony credible, and considered it as part of the determination regarding jurisdiction under 42 Pa.C.S. § 9545(b), as discussed *infra*.

[15] The Commonwealth represented to this Court that it filed "secure archive information" during the federal habeas corpus litigation of this case. According to the District Attorney's Office, it was an "old mental health evaluation" in microfilm "maintained by a court or some agency, not by the Commonwealth or the police," and there was "no overlap" between that evaluation and the evidence uncovered during this PCRA litigation. N.T. 9/24/2012 at 5-6.

under the age of 18." Id. at 5-6. The Commonwealth filed its Motion to Dismiss and Opposition to Stay of Execution on September 7, 2012.

On September 10, 2012, this Court heard argument on the pleadings, and permitted appellee the opportunity to obtain and submit additional information from Draper by September 13, 2012 at 5 P.M.[16] N.T. 9/10/2012 at 101-02. The following day, this Court heard the Commonwealth's argument that Draper should be appointed counsel prior to appellee's counsel being permitted to speak with him. N.T. 9/11/2012 at 8-10. The Commonwealth's motion to have counsel appointed for Draper was denied. Id. at 17. Appellee's counsel obtained and filed Draper's third statement, an affidavit, on September 11, 2012. (See Attachment B, which is pages 1-10 of Exhibit P-16 in the PCRA hearing before this Court).

On September 14, 2012, this Court heard further argument from appellee as to the timeliness of the current petition, after which this Court found that there was an issue of material fact meriting an evidentiary hearing pursuant to Pa.R.Crim.P. 909(B)(1) in order to determine whether government officials pressured Draper to testify that appellee's motive for the crime was to rob Amos Norwood, not to kill him because of a homosexual relationship between them. The evidentiary hearing was scheduled for September 20, 2012; Draper and Andrea Foulkes, the trial prosecutor, were the only two witnesses expected to testify.[17] Additionally, in an effort to ensure that potential pre-hearing preparation did not interfere with the credibility determinations that this Court would ultimately have to make,

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[16] At the conclusion of the September 10, 2012 argument, appellee, who had been brought in from SCI-Greene, agreed to waive his presence at all future hearings. N.T. 9/10/2012 at 108.

[17] Pa.R.Crim.P. 909(B)(3) requires that an evidentiary hearing be scheduled no fewer than ten days nor more than 45 days after the date of the order setting a date certain for the hearing. In light of the extenuating circumstances in this case – merely 18 days separated the September 14, 2012 argument from the impending execution – this Court scheduled the evidentiary hearing six days after that argument. Neither party objected to the expedited evidentiary hearing.

this Court prohibited both parties from communicating with the two witnesses prior to the hearing.[18] Order to Comply, 9/14/2012. On September 18, 2012, this Court ordered that the Commonwealth produce the trial files for the two cases which Ms. Foulkes prosecuted against appellee in 1985 and in 1986, and in which Draper was the key Commonwealth witness – the Herbert Hamilton and Amos Norwood murders, respectively.[19]

This Court conducted the evidentiary hearing on September 20 and September 24, 2012. On Saturday, September 22, 2012, this Court directed that the Commonwealth also produce the Philadelphia Police Department's files concerning the same two cases.[20] After Draper's testimony concluded on the 24th, both sides were given an opportunity to look through those police files. On September 25, 2012, the documents uncovered during the parties' review, as well as during the Court's independent review of same, were introduced

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[18] As soon as this Court granted an evidentiary hearing, the Commonwealth's attorneys handed up a writ to have Draper, whom they had already requested to be sent from SCI-Frackville to SCI-Graterford, be transported by District Attorney's Office detectives to their office to be interviewed. N.T. 9/14/2012 at 71. The Court declined to issue the writ, but had concerns that "prepping" the two witnesses expected to testify would affect their recollection and spontaneity when testifying before this Court. Id. at 83-84. For this reason, the Court entered an order prohibiting any communication between counsel and the two witnesses. Prior to this Court's Order prohibiting such communication, the Commonwealth had provided Ms. Foulkes, now an Assistant United States Attorney in the Eastern District of Pennsylvania, with a CD that contained all of the pleadings relevant to the instant litigation as well as the Notes of Testimony from all hearings dating back to the Herbert Hamilton trial. N.T. 9/20/2012 (P.M.) at 34. The contents of the CD are listed in Attachment C. When this Court issued its Order, Ms. Foulkes was asked to turn over the CD, which she did. Ms. Foulkes had asked for an opportunity to review the two files to which she had been assigned, and she was permitted to do so. But this Court found that what was on the CD went well beyond that.

[19] The Commonwealth did not object to this Court's directive that the trial files be produced. Both sides had an opportunity to go through these files and mark documents that they intended to utilize at the evidentiary hearing before this Court. The only aspect of the files exempted from disclosure and review was the trial prosecutor's notes regarding jury selection. This Court reviewed those files *in camera* and found them irrelevant to the instant matter other than as discussed in the Appendix.

[20] The Philadelphia Police Department provided First Assistant District Attorney Edward McCann two boxes, labeled H-84-026 (Herbert Hamilton victim) and H-84-127 (Amos Norwood victim). "H" stands for Homicide, "84" stands for the year, and the last numbers represent which murder case it was, chronologically. Mr. McCann had the two boxes immediately transported to this Court. Again, the Commonwealth did not object to this Court ordering their production and inspection.

into evidence.[21] Having filed Petitioner's Motion to Conform the Petition to the Hearing Evidence and to Supplement and Amend on September 24, 2012, appellee reiterated this on September 25, 2012, making an oral motion to "conform the [appellee's] proof to the evidence submitted at the hearing and to have [the Court] allow us to take the testimonial evidence from the hearing and the documents from the hearing as an amendment and supplement to our petition." N.T. 9/25/2012 at 51. This Court granted appellee leave to amend.[22] Id. at 77. Thereafter, appellee in fact amended his PCRA petition, filing an Amendment and Supplement to Petition for Post-Conviction Relief on the morning of September 28, 2012, wherein he asserted, among other things, that the Commonwealth presented the jury with "sanitized characterizations of the victims in this case," and argued for relief on the basis of Cone v. Bell, 556 U.S. 449 (2009) and Banks v. Dretke, 540 U.S. 668 (2004). Subsequent to that filing on September 28, 2012, this Court ruled on appellee's issues, denying all guilt-phase issues but granting relief in the form of a new penalty phase

[21] The information uncovered from the District Attorney's files and the Philadelphia Police Department's files will be referred to in this Opinion collectively as the "government's files," based on the holding in Kyles, that prosecutors have a duty to learn of any favorable evidence known to others "acting on the government's behalf in this case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995); Commonwealth v. Gibson, 951 A.2d 1110, 1127 (Pa. 2008); Commonwealth v. Burke, 781 A.2d 1136, 1142 n.5 (Pa. 2001).

[22] See Pa.R.Crim.P. 905(a) ("The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.").

hearing for the reasons discussed below.[23] The Court also entered an Order staying appellee's execution.[24]

FACTS

The facts presented at trial substantiating appellee's first degree murder, robbery and criminal conspiracy convictions have been presented in detail by our Supreme Court and by the Third Circuit. Williams I, 570 A.2d at 77-79; Williams, 637 F.3d at 198-202. The basic facts underlying appellee's conviction for the murder of Amos Norwood are as follows[25]:

On Monday, June 11, 1984, appellee met Draper at Mount Pleasant Avenue and Lincoln Drive to gamble with a few other friends. N.T. 1/22/1986 at 665. After gambling for close to an hour, the pair ran out of money. Id. at 666. Appellee told Draper that "he had an idea that he knew somebody around the corner to get some money from." Id. at 667. Appellee explained to Draper that this source of money was a man he knew named Amos, whom he had met at a bar downtown. Id. Appellee told Draper that he was "going to try to extort him by telling his wife that he was a homosexual." Id. at 667-68. The two

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[23] As a necessary component to the Court's ruling, the Court was constrained to conclude that the trial prosecutor was less than candid when testifying at the September 2012 PCRA evidentiary hearing. Based on her testimony concerning the two cases which she prosecuted against appellee, this Court ultimately concluded that the trial prosecutor engaged in "gamesmanship," knowingly suppressing evidence that she believed was substantially similar to that which led to a compromise verdict in the Hamilton case. Intentionally rooting evidence out of the Norwood prosecution in order to secure a first degree murder conviction and death penalty sentence constitutes "gamesmanship." Some of the credibility determinations that led this Court to that conclusion are delineated and discussed in the body of this Opinion. The Court has also attached an "Appendix," detailing how Ms. Foulkes' testimony before this Court and instances from her prosecution of appellee led to this Court's credibility determinations. The Appendix is explicitly made a part of this Opinion and is incorporated herein by reference.

[24] On September 28, 2012, this Court found that the other claims raised by appellee in his March 9, 2012 petition with respect to CP-51-CR-0823621-1984 (Norwood case) were without merit. N.T. 9/28/2012 at 12-13. A notice of appeal regarding those rulings was filed on October 25, 2012, but a docketing number has not yet been assigned for that cross-appeal. A separate opinion regarding that appeal will be filed in due course. This Court did not make any decision with respect to CP-51-CR-0907971-1984 (Hamilton case), as the focus was on the matter in which Governor Corbett had signed an execution warrant which was to be effectuated on October 3, 2012.

[25] Draper was the sole Commonwealth witness to testify about the events leading up to Amos Norwood's death.

walked together towards this man's home; however, before they arrived at their destination, appellee told Draper to wait at the top of the street while appellee entered the home. Draper estimated that he had to wait for 20 minutes before he saw appellee emerge with $10 in hand. Id. at 668-69. As Draper asked appellee about the money, a woman walked past them towards the Norwood home; appellee told Draper that woman was Mr. Norwood's wife. Appellee said, "Excuse me, Miss, excuse me, Miss," but the woman did not hear him. Id. at 670.

The pair then returned to the corner where they had been gambling. Roughly ten minutes later, appellee stood up and said, "There goes my uncle,"[26] as Mr. Norwood drove past the group. Id. at 671. Appellee ran to the car, got in, and drove off with Mr. Norwood on Lincoln Drive. Id. They returned a few minutes later, and appellee stepped out of the car. He walked to Draper and told him to get in the car and "play it off like you going home, like you want a ride home, and we gonna take some money." Id. at 672. Once he sat in the backseat, Draper gave Mr. Norwood "phony directions," directing the car towards a dark street adjacent to a cemetery. Around that time, Draper grabbed Mr. Norwood from his position in the backseat and appellee ordered Mr. Norwood out of the car. Id. at 673-74. At appellee's direction, the three men walked towards the edge of the cemetery. Appellee jumped the fence into the cemetery first, followed by Mr. Norwood and then Draper. Id. at 674. After walking into the dark, appellee told Mr. Norwood to lay down. Appellee and Draper took Mr. Norwood's clothes off and used them to hogtie him. Mr. Norwood said the pair could just take the money and leave, but appellee refused, ordering Draper to stand with Mr. Norwood while he ran back to the car. Appellee returned with a handful of tools

[26] At the PCRA evidentiary hearing before this Court, Ms. Foulkes testified that, from her prosecution of appellee for killing Herbert Hamilton, she understood the term "uncle" to be a term of "familiarity." In the Hamilton trial, Antonio Williams had referred to his older homosexual lover, decedent Herbert Hamilton, as his "uncle." N.T. 9/20/2012 (A.M.) at 16-19.

including a socket wrench and a tire iron. Despite Draper's pleading with appellee to leave, appellee "started getting mad" and hit Mr. Norwood with a tire iron. Appellee then ordered Draper to hit Mr. Norwood with the socket wrench. Id. at 679-81. Together the pair beat Mr. Norwood until he appeared to be dead, pulled Mr. Norwood's body between two tombstones, and then took Mr. Norwood's car.[27] Id. at 682. That night, appellee returned to the cemetery by himself, soaked Mr. Norwood's body in gasoline and set it on fire. Id. at 688.

LEGAL ANALYSIS

Petitioner raises the following issues on appeal:

1. Was the lower court without jurisdiction to consider defendant's third PCRA petition where his timeliness exception claims[28] raised a claim known to him years before he filed the petition?
2. Whether the lower court erred in finding that the information allegedly suppressed by the Commonwealth was otherwise unavailable to defendant, would have been helpful to his case and admissible, and met the legal standard for "materiality."[29]

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[27] Once they left the cemetery, the two men threw Mr. Norwood's possessions into a metal trash can in a nearby Pathmark parking lot. The next day, they returned to the trash cans, and fished through them for credit cards or money. After finding Mr. Norwood's credit card and AT&T phone card, the pair went to Atlantic City with a man named Ronald Rucker to try to get money from the credit card. Id. at 689-90.

[28] This Court found as valid only one timeliness exception claim – governmental interference. The "claim" that was "raised" by the "timeliness exception claims," which the Commonwealth alleges was known to appellee "years before he filed the petition" is presumably the underlying Brady claim upon which this Court found appellee is entitled to relief under 42 Pa.C.S. § 9543(a)(2)(i). As discussed *infra*, appellee did not know of this Brady claim – based on withheld evidence of Norwood's sexually inappropriate behavior – "years before he filed the petition."

[29] On October 3, 2012, appellant filed both a Notice of Appeal and a Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b) (Statement of Errors). On October 12, 2012, appellant applied for leave to amend its Statement of Errors and affixed an Amended Statement of Errors, which included the second issue addressed herein. The Court issued an Order on October 15, 2012, formally accepting appellant's Amended Statement of Errors.

Appellee's timeliness exception claim of governmental interference, which this Court found was established and which accorded this Court jurisdiction, did not raise a claim known to appellee for years before he filed the instant petition; appellee actually learned of his claim – a claim of suppressed material evidence which this Court found met all the requirements under Brady v. Maryland, 373 U.S. 83 (1963) – during the evidentiary hearing which was ordered in this case.

This Court found that the Commonwealth suppressed multiple pieces of evidence, all of which shared a common feature: each strengthened the inference that Amos Norwood was sexually involved with boys around appellee's age at the time of his murder. The Commonwealth withheld one such statement entirely[30] and turned over to the defense two "sanitized" statements.[31] In those "sanitized" statements, direct and indirect evidence of Mr.

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[30] This was evidenced by Ms. Foulkes' handwritten note found in the District Attorney's Office's Norwood trial file. Ms. Foulkes had a conversation in which she learned that Ronald House, a 16-year old boy in Amos Norwood's church, was groped "on privates" by Mr. Norwood, and that there were other "possible incidents." N.T. 9/20/2012 (P.M.) at 120-23. (See Attachment D, marked as Exhibit Court-2 before this Court, page 2). For this Court's discussion of how Ms. Foulkes' pattern of selective non-disclosure amounted to "gamesmanship," see Appendix.

[31] This was evidenced by a June 1984 police activity sheet. Mamie Norwood, Amos Norwood's widow, and Reverend Charles Poindexter, Amos Norwood's colleague at St. Luke's Church and friend for almost 30 years, both made statements to police about Mr. Norwood's homosexual involvement with teenage boys in his community. The police activity sheet revealed that Mrs. Norwood told police about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. Mrs. Norwood told police that "at that point" she believed it to be a kidnapping. She watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made no comment on her belief in the veracity of the story." (See Attachment E, marked as Exhibit P-24 before this Court, page 2). In the version of Mamie Norwood's statement that was disclosed to the defense, this entire account was omitted. (See Attachment F, marked as Exhibit C-2 before this Court, item 17). In fact, the only mention of Mr. Norwood driving young males in his car was Mrs. Norwood's statement: "[m]y husband would drive the kids home [from church] who didn't have a ride so a lot of people were in his car at times," and that "he would have to know the person very well to pick them up. He never picked up strangers." Id.

The same police activity sheet also revealed that Reverend Poindexter told police "in confidence" that Mr. Norwood "may have been a homosexual," and that he had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." (See Attachment E, marked as Exhibit P-24 before this Court, page 1). Additionally, the activity sheet noted

Norwood's ephebophilia[32] had been omitted, the government interfered with appellee's ability to present the claim that his due process right to a fair trial had been violated. This claim has not been waived, nor previously litigated, as it is based on information discovered in September 2012. The suppression of this evidence, which could have been used to develop *and* pursue an alternate theory at the penalty phase, undermines confidence in the jury's death sentence, thereby constituting a meritorious claim of a constitutional violation under Brady v. Maryland, 373 U.S. 83 (1963) and Cone v. Bell, 556 U.S. 449 (2009).[33]

I. Jurisdiction

For this Court to have jurisdiction to grant appellee's PCRA petition, the petition must have been filed within one year of the date that the judgment became final, or appellee must prove one of the three timeliness exceptions delineated in 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). See 42 Pa.C.S. § 9545(b)(1). Given that the judgment against appellee became final decades ago, jurisdiction would not exist without appellee satisfying a timeliness exception. Additionally, the instant petition had to be filed within 60 days of the date that it could have

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(FN cont'd...) that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." Id. In the version of Reverend Poindexter's statement that was disclosed to the defense, all mention of homosexuality was removed. (See Attachment G, marked as Exhibit C-2 before this Court, item 19). In response to the question by police, "Do you know of any problems Mr. Norwood had in the past?," the statement included an answer about how five years earlier, men "came to [Mr. Norwood's] house, and told his wife, they had him in the car and wanted money." Id.

[32] "Ephebophilia" is the psychological term for the attraction of adults to adolescents. It derives from the root "ephebe," which means "a young man." Webster's New Encyclopedic Dictionary 610 (2002).

[33] This Commonwealth has had the death penalty in effect since its reinstatement in 1978 and, as the law of this Commonwealth, this Court has followed it in presiding over more than a dozen capital cases and in imposing the jury's verdict of death in three of those cases. An integral part of the jurisprudence of the death penalty is that it is for the jury to decide whether the defendant and the case before them is more – or less – deserving of the death penalty. See Commonwealth v. Blount, 647 A.2d 199, 209 (Pa. 1993) (finding that the process of weighing aggravating and mitigating factors is the "exclusive function of the jury"). Inherent in this determination is that the jury be given the full picture of what the case was about, and what may have prompted the defendant's unlawful actions – including behavior of the victim as it relates to the circumstances of the offense and of the defendant. By withholding from the jury the full picture in the instant case, the trial prosecutor elected to put herself in the role of controlling what the jury's verdict should be, thereby usurping the jury's unique role in the determination of the penalty.

first been presented. 42 Pa.C.S. § 9545(b)(2). Our Supreme Court has indicated that the 60-day rule requires appellee to "explain why, with the exercise of due diligence, the claim could not have been filed earlier." Commonwealth v. Marshall, 947 A.2d 714, 720 (Pa. 2008), *citing* Commonwealth v. Breakiron, 781 A.2d 94, 98 (Pa. 2001).

(1) 42 Pa.C.S. § 9545(b)(1)

In this case, the Court concluded that appellee satisfied the first timeliness exception, "governmental interference." "Although a Brady violation may fall within the governmental interference exception, the petitioner must plead and prove the failure to previously raise the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise of due diligence." Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1268 (Pa. 2008), *citing* Breakiron, 781 A.2d at 98 (combining the requirements of § 9545(b)(1)(i) and § 9545(b)(2)). When a claim of governmental interference is rooted in the Commonwealth's failure to produce exculpatory evidence, appellee bears the burden to "identify a specific claim that he was unable to discover or develop due to the District Attorney's conduct." Commonwealth v. Howard, 788 A.2d 351, 355 (Pa. 2002), *citing* Commonwealth v. Yarris, 731 A.2d 581, 588 (Pa. 1999). In Howard, the petitioner could not demonstrate governmental interference because he failed to "explain how the District Attorney's conduct hobbled his development or prevented his discovery of any particular claim." Howard, 788 A.2d at 355. Likewise in Commonwealth v. Stokes, the petitioner was aware of potentially exculpatory information in files maintained by the United States Postal Service and the Philadelphia Police Department for years before he sought them, and he "never asserted that the prosecution (or anyone else) prevented him from gaining access to these files in the 12 years between the date his direct appeal was decided

and the date he ultimately sought the files." 959 A.2d 306, 310 (Pa. 2008). Accordingly, Stokes' governmental interference claim was fatally flawed. Id. at 311.

In the instant matter, this Court found that appellee met its burden of identifying a specific claim he was unable to discover or develop due to the government's conduct. This Court found that the government interfered with appellee's presentation of a claim under Brady in two ways. First, the act of removing pertinent information from a statement, and providing a "sanitized" version, which purports to be the entirety of the statement, is interference in and of itself. The government's sanitization of Mamie Norwood's and Reverend Charles Poindexter's statements, and flat non-disclosure of information about Amos Norwood's sexual advances on Ronald House, interfered with appellee and his attorney learning that Mr. Norwood had engaged in sexually inappropriate behavior with teenage boys other than appellee. By scrubbing these statements of references to Mr. Norwood's sexual improprieties and then providing the "clean" versions, the government created the false impression that appellee was given the full account of what these witnesses stated. That false impression "hobbled" appellee's ability to "discover or develop" a Brady claim rooted in information removed from the scrubbed statements. That false impression was maintained by the Commonwealth until the original statements were found – in the government's files and some in the very handwriting of the trial prosecutor.

Second, throughout the litigation of this case, the government has disputed the existence of information in their files about Amos Norwood's homosexual ephebophilia, thus further interfering with appellee learning the facts that form the basis of the instant Brady claim. In Stokes, our Supreme Court affirmed the PCRA Court's determination that there had been no governmental interference, as the petitioner was aware of the existence of information in the files of the United States Postal Service and the Philadelphia Police

Department for years. Stokes, 959 A.2d at 310. In fact, the trial prosecutor in that case maintained an "open file" policy, which highlighted how the *government* had given the petitioner access to relevant information. Id. at 311. The government's behavior in this case is notably different. Here, the government has continually denied the existence of exculpatory evidence.

At the 1998 evidentiary hearing regarding appellee's 1995 PCRA petition, the government intervened as appellee attempted to put forth evidence that Amos Norwood had been sexually abusive towards young boys, including appellee. When appellee proffered that evidence, Judge Savitt looked to the Commonwealth for clarification, asking directly: "there is nothing in the case involving Norwood's homosexuality or violation of young boys[?]" N.T. 4/8/1998 at 237. The Commonwealth responded to Judge Savitt's question, "Oh, no, just that he knew about Norwood's behavior and was trying to extort money[34] from it."[35] Id. Precisely the evidence that Judge Savitt asked for was sitting in the

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[34] The "extortion" plot referenced by the Commonwealth in response to Judge Savitt's question is different from the evidence that the government suppressed. In his July 20, 1984 statement to police and again at trial in the Norwood case, Draper said that appellee suggested that the two men "extort" Mr. Norwood by telling his wife that he was gay. See Attachment O, which was marked as Exhibit P-2 in the PCRA hearing before this Court; N.T. 1/22/1986 at 667-68. Ms. Foulkes referenced this in her opening statement. N.T. 1/14/1986 at 44. Draper's testimony that appellee said he might exploit his knowledge of Mr. Norwood's sexual *orientation* is critically different from evidence that Mr. Norwood molested and/or attempted to molest teenage boys.

[35] The record of this discussion reflects that Judge Savitt and ADA Silverstein were talking at the same time towards the tail end of Judge Savitt's question about Norwood's violation of young boys.

> THE COURT: But there is nothing in the case involving Norwood's homosexuality or violation of young boys –
> ADA SILVERSTEIN: Well, that was the secret.
> THE COURT: – that accrued that was involved.
> ADA SILVERSTEIN: Oh, no, just that he knew about Norwood's behavior and was trying to extort money from it. It didn't work so it moved on to robbery and murder, so it was not a secret. It was not a secret to anyone at that time.

N.T. 4/8/1998 at 235-37.

The only reasonable way to read the back-and-forth is that when ADA Silverstein responded, "Oh no, just that he knew about Norwood's behavior and was trying to extort money from it," that he was responding to Judge Savitt's question.

government's files. Without that evidence, the Court forcefully attacked the relevance of testimony proffered by the defense as to any potential sexual impropriety in Norwood's past. Based on the Commonwealth's affirmative misrepresentation[36] that there was nothing else in the case involving Norwood's "homosexuality or violation of young boys," Judge Savitt prevented both lay witnesses and expert witnesses from developing that issue. Id. at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605.

There is nothing in the text of § 9545(b)(1)(i) requiring that the Commonwealth *maliciously* interfere in the presentation of a claim. Our Supreme Court has long held that the statutory language of the PCRA must be "strictly adhered to." Commonwealth v. Pursell, 724 A.2d 293, 303 (Pa. 1999). The plain language of § 9545(b)(1) requires only that "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution." Therefore, the PCRA prosecutor's state of mind when representing to the Court that there was nothing in this case about the victim's violation of young boys is not dispositive. Based on the statement of the Commonwealth, Judge Savitt stated that he would "not consider [Mr. Norwood's desire to have sex with kids] as a fact unless on the – on this bare assertion. Now, you should understand that. There would have to be evidence of it and, in other words, what was seen, when it was seen, who was present, who was involved."[37] N.T. 4/13/1998 at 602. Having removed such evidence from the case prior to trial, the government's continuing assertion

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[36] As discussed *infra*, the trial prosecutor is charged with a duty to "learn of" what exculpatory evidence is in the police files. Kyles, 514 U.S. at 437; Gibson, 951 A.2d at 1127; Burke, 781 A.2d at 1142 n.5. The PCRA prosecutor was specifically questioned by the Court as to whether exculpatory evidence was in "the case." As per the dictates of Kyles and its progeny, "the case" encompasses both the District Attorney's Office and police files. The prosecutor's manner of response implied that he had gone through all pertinent files in the case and found nothing. In fact, the information that he stated did not exist was in the government's files and obviously had not been turned over.

[37] This Court does not disagree that bare assertions are insufficient. However, the evidence uncovered in the government's files possesses the necessary degree of specificity.

that no such evidence existed amounted to continuing governmental interference from the time of trial until the government's files were ordered to be opened in September 2012.[38]

(2) 42 Pa.C.S. § 9545(b)(2)

In its Statement of Errors, the Commonwealth argues that appellee's "timeliness exception claims raised a claim known to him years before he filed the petition." In order to answer the Commonwealth's claim of error, this Court must identify when appellee's timeliness exception claim became known to him. Appellee could not have known that the government interfered with the presentation of evidence about Amos Norwood's homosexual ephebophilia until such evidence was uncovered. It became clear for the first time in September 2012 that the Commonwealth made incomplete disclosures to defense counsel at the time of trial, and that the government's representations to the 1998 PCRA Court were, in fact, misrepresentations.[39] Within 60 days of the date that the instant Brady

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[38] As there is – and was – a close working relationship between the District Attorney's Office's Homicide Unit and the Philadelphia Police Department Homicide Unit, the Assistant District Attorneys assigned to this case could have reviewed the contents of the Police Department's files at any time. Yet as late as the September 14, 2012 hearing before this Court, ADA Ronald Eisenberg himself made a statement which was not entirely true about the scope of the evidence: "[Y]es, there was one piece of a homosexual element to the case. The defendant said he could extort money from Norwood by threatening to reveal that he was gay. That's what he [Draper] said starting from the first time he ever spoke to police about this case." N.T. 9/14/2012 at 57. In addition to the note about Ronald House's sexual abuse as discussed *supra*, there were in fact multiple handwritten notes by Ms. Foulkes referencing homosexuality. On a note titled "Ask Marc," Ms. Foulkes wrote, "What motivates Terry? Money, self, betrayal, homosex." (See Attachment H, which was marked as P-5 in the PCRA hearing before this Court). In a note found in the Hamilton trial box titled "prep – M.Draper 12-20-84 PAB," Ms. Foulkes wrote "knew that Terry made $ by going to bed w/men." (See Attachment I, which was marked as P-8 in the PCRA hearing before this Court). And on another note titled "Marc Draper 12-27-85," Ms. Foulkes jotted down the sequence of events from the Norwood killing, and included the following details: "did he [Mr. Norwood] know Terry – liked boys." On the next page, Ms. Foulkes wrote, "did he like boys," and below that "how long had he known Terry." (See Attachment J, which was marked as P-9 in the PCRA hearing before this Court). Lastly, on another note Ms. Foulkes made a more general, though cryptic, reference about the state of the case: "continued investig. for faggot squad." N.T. 9/20/2012 (A.M.) at 37-40.

[39] The United States Supreme Court's opinion in Banks v. Dretke, 540 U.S. 668, 698 (2004) offered persuasive guidance to this Court about the impact of government misrepresentations regarding the existence of evidence on whether a defendant can fairly be considered not diligent for pursuing such evidence.

> In summary, Banks's prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. It was not incumbent on Banks to prove these representations false; rather,

claim first could have been presented, appellee filed his September 28, 2012 amendment to his PCRA petition, wherein he explained "why, with the exercise of due diligence, the claim could not have been filed earlier," thereby satisfying the second "jurisdictional" requirement. 42 Pa.C.S. § 9545(b)(2); Marshall, 947 A.2d at 720, *citing* Breakiron, 781 A.2d at 98.

For a court to have jurisdiction over a PCRA petition filed more than one year after the date the judgment became final, both § 9545(b)(1) and § 9545(b)(2) mandate that the petitioner explain the delay in raising "the claim."[40] In a Brady case, this claim-centric perspective means that appellee must set forth "when and how he discovered the Brady material that the Commonwealth allegedly withheld from him." Breakiron, 781 A.2d at 98. Likewise, in Commonwealth v. Hawkins, our Supreme Court analyzed the jurisdictional requirements of § 9545 in the context of a Brady claim by asking when "the facts upon which [the appellant's] Brady claim is based were first revealed," and whether "due diligence would not have revealed them before that time." 953 A.2d 1248, 1253 (Pa. 2008).

In the instant matter, the facts substantiating appellee's Brady claim were first discovered in September 2012. Appellee's due diligence would not have revealed that prior to the PCRA hearing before this Court.[41] Based in part on Draper's January 9, 2012

(FN cont'd...) Banks was entitled to treat the prosecutors' submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Fart Brady claim.

[40] 42 Pa.C.S. § 9545(b)(1)(i) requires that "the failure to raise the claim was the result of interference by government officials . . . ." (Emphasis added). 42 Pa.C.S. § 9545(b)(2) requires that "[a]ny petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented." (Emphasis added).

[41] Appellee's September 6, 2012 discovery request for exculpatory information about Norwood's sexual relationships with children under the age of 18 was based on statements made by Reverend Charles Poindexter and Ronald House to appellee's counsel in early 2012. Appendix to Petition for Post-Conviction Relief, 7/16/2012, items 10 and 11 respectively. At that time, Reverend Poindexter stated that Norwood "seemed to have lots of close relationships with young men, most of whom I didn't know. We began to suspect that Amos was having inappropriate relationships with young men." Id. at item 10, paragraph 6. Reverend Poindexter also stated that "the mother of a 15-year old boy" told him "that while Amos was driving her son home from a youth group event, Amos touch [sic] her son's genitals. She also told me that Amos had inappropriately touched a number of other boys at the church." Id. at item 10, paragraph 15. Reverend Poindexter identified

declaration that he had been pressured to testify that appellee's motive for the crime was to rob the victim, and not to go into detail about their homosexual relationship, appellee filed the instant PCRA petition on March 9, 2012. This Court found that appellee's claim had arguable merit and, if sufficiently proved at an evidentiary hearing, potentially satisfied the

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(FN cont'd...) Ronald House as a victim of Norwood's sexual advances. Affidavits of Jennifer Givens and Eric Montroy, 9/27/2012 at 2 (See Attachment K). On the basis of that statement of Reverend Poindexter, appellee's attorneys interviewed Mr. House, who said that Mr. Norwood propositioned him for sex when he was 17, and had done the same thing to a friend of his named Bernard. Appendix to Petition for Post-Conviction Relief, 7/16/2012, item 11, paragraphs 4-6.

Appellee's attorneys went to speak with Reverend Poindexter on January 12-13, 2012 after having spoken with Draper on January 9, 2012. On that date, Draper stated that he had told detectives during trial prep sessions that:

> Norwood was a homosexual and that he was in a relationship with Terry and that that is what this case was really about. They did not want to hear that. They wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery.

Declaration of Marc Draper, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court).

After Draper "disclosed for the first time the information stated in paragraphs 4 [quoted above] and 7," appellee's attorneys "looked into potential witnesses who might know something confirming the new disclosures by Mr. Draper." Affidavits of Jennifer Givens and Eric Montroy, 9/27/2012 at 2 (See Attachment K).

> We reviewed the 6/22/84 police report (with a statement from Reverend Poindexter) provided by the Commonwealth in discovery to Mr. Panarella, which included this comment from Reverend Poindexter: "Several years ago, within the last 5 years, he [Mr. Norwood] was abducted and the men came to the house, and told his wife they had him in the car and wanted money."

Id.

Draper's January 9, 2012 declaration cast Reverend Poindexter's June 22, 1984 statement in an entirely new light. Draper's allegations that the police pushed him to re-shape a story about a sexual relationship gone wrong and to call it a "robbery" would lead a diligent attorney to take a second look at any other possible instances in which witnesses had told police about prior "robberies" involving Amos Norwood. The reference to Norwood's prior robbery in the disclosed version of Reverend Poindexter's June 22, 1984 statement sounds bizarre at first blush. But when viewed through the lens of Draper's January 9, 2012 declaration – that "robbery" was the brush used to sweep homosexual impropriety under the rug – Reverend Poindexter's statement called for follow-up. And though that follow-up led to Reverend Poindexter saying there was much more to Amos Norwood and led to Ronald House detailing his experience with Mr. Norwood, it did not lead to knowledge that the government had had this information all along. That only came about after this Court ordered the District Attorney's and Police Department's files opened.

And, as it turned out, it was shown that the government had removed references to Mr. Norwood's homosexual ephebophilia from Reverend Poindexter's statement, and from Mamie Norwood's, thereby making it seem that Mr. Norwood was just a kind church volunteer who had been the victim of a bizarre robbery years earlier.

requirements of § 9545(b)(2).[42] At the evidentiary hearing, appellee discovered exculpatory evidence that had been in the government's files since the time of trial and had never before been turned over to the defense. After the hearing, appellee requested leave to amend his March 9, 2012 PCRA petition to include a more nuanced Brady claim focused on the evidence uncovered. N.T. 9/25/2012 at 51. That request was granted, and on September 28, 2012, appellee filed an Amendment and Supplement to Petition for Post-Conviction Relief. Therein, appellee argued that he was entitled to relief based on information that came to light for the first time in September 2012 – namely that the government withheld multiple statements from trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys in his community.

This latter claim could not have been filed earlier with the exercise of due diligence because appellee was unable to gain access to the government's trial files until this Court granted an evidentiary hearing on September 14, 2012. In fact, appellee was duly diligent in pursuing this evidence. Appellee attempted to elicit testimony at the 1998 PCRA hearing about the victim's homosexual ephebophilia through fact witnesses James Villareal and Donald Fisher. N.T. 4/8/1998 at 229; N.T. 4/13/1998 at 597-605. However, appellee was stifled in his presentation of that evidence by the Commonwealth's steadfast representation that there was no such evidence, and Judge Savitt's consequent limitation on the 1998 PCRA

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[42] In Morris II, our Supreme Court noted that, when deciding whether a stay of execution is appropriate, jurisdictional questions "should be well fleshed out in advance and we believe that issues related to timeliness should be relatively easy to dispose of by the time they reach this court." Commonwealth v. Morris, 822 A.2d 684, 692 (Pa. 2003) ("Morris II") (emphasis added). In Morris II, the appellant asserted that he was entitled to an evidentiary hearing regarding witness compensation for testimony as part of a claim of governmental interference. Our Supreme Court rejected the appellant's claim because it was "speculative ... in the absence of any allegations tying the witnesses in a particular case to the District Attorney's policy of paying for their services." Id. at 699. Unlike the situation in Morris II, appellee's governmental interference claim as set forth in his March 9, 2012 petition and July 27, 2012 Amended Petition was based on averments which, if believed, would have constituted a sufficient basis upon which jurisdiction could have been rooted. This Court found that appellee's claim regarding the government's undue pressure on Draper created a "material issue of fact," and thus required an evidentiary hearing pursuant to Pa.R.Crim.P. 908(A)(2).

proceedings. From the time that Judge Savitt denied relief until the Third Circuit denied appellee's habeas corpus claims, the litigation had lasted for approximately 16 years. By the time the Third Circuit ruled, appellee had almost no avenue left and execution became a real possibility.

Nevertheless, the defense was still actively involved in its representation of appellee. The defense prepared a petition for a writ of *certiorari*, which it filed in the United States Supreme Court on December 13, 2011. While awaiting a decision from that Court, appellee's counsel approached Draper to see if the possibility of appellee's potential nearing execution would finally prompt him to speak with them.

Dating back to the time of trial, Draper had refused to speak with appellee's attorneys.[43] Appellee's attorneys again tried to speak with Draper on an occasion when he was at SCI-Graterford, which was from 1995-2006. N.T. 9/24/2012 (A.M.) at 35. Draper testified that he did not speak with appellee's representatives because, "I didn't want to speak on anything to anybody." N.T. 9/20/2012 (P.M.) at 210. Draper cited fear that the police would still charge him with the murder of Donna Friedman, as well as feelings of anger at himself as reasons for his self-imposed silence. Id. at 208; 211. This Court found Draper's explanations for having refused to communicate credible and therefore accepted them.

Thus, when appellee's attorneys visited Draper at SCI-Frackville in January 2012 as a "last ditch attempt," and told him that appellee was "about to be put to death," Draper decided to break his silence. Id. at 215. While testifying before this Court, Draper broke down crying, stating that "nobody wants to know that you a transformed person [sic].

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[43] Mr. Panarella testified at the post-trial motions hearing, "Mr. Draper would not discuss the case with my associate." N.T. 4/24/1987 at 7.

Nobody wants to know that what type of person you are now from when you was 18 [sic]. I'm 46 now." Id. at 216. This Court found credible Draper's reasoning for finally speaking up. It made sense. He talked about how maturity and his "relationship with the Lord" motivated him to speak because "if I call myself a Christian, right, and I live by faith, not by sight, and God loved me so much, then, you know, he blessed me so much that, you know, I have to share that blessing and I wouldn't want to see anybody put to death." Id.

"Diligence" is defined as "[a] continual effort to accomplish something"; "care; caution; the attention and care required from a person in a given situation."[44] Black's Law Dictionary (9th ed., 2009) ("diligence"). Considering appellee's "situation" as part of the "due diligence" calculation, this Court found it significant that there were a number of instances in which Draper rebuffed appellee's attorneys when they had sought to speak with him.[45] Additionally, even after the Third Circuit denied his habeas corpus petition in March 2011, appellee's counsel were busy pursuing relief on his ineffective assistance of counsel claim with the United States Supreme Court. Instead of waiting for the High Court to grant or deny *certiorari*, or for Governor Corbett to sign his execution warrant, appellee took action reasonably quickly after March 2011, to ensure that no stone had been left unturned.

As a result of Draper's two declarations, appellee filed the March 9, 2012 PCRA petition, which led to this Court's decision to grant an evidentiary hearing, to the discovery of the exculpatory documents, and thus ultimately to the underlying substantive Brady claim.

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[44] Black's Law Dictionary defines "due diligence" by referring to its entry for "diligence." Black's Law Dictionary, (9th ed., 2009) ("due diligence").

[45] In the context of Pa.R.Crim.P. 600 – the speedy trial rule – our courts have emphasized that due diligence must be determined on a case-by-case basis. "Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth." Commonwealth v. Hill, 736 A.2d 578, 588 (Pa. 1999) (emphasis added). A "punctilious care" standard would require that an individual renew efforts having been rebuffed multiple times. However, a "reasonable effort" standard allows for reliance on a representation that the evidence sought cannot be obtained.

This claim satisfies the 60-day provision of § 9545(b)(2), as it was formally filed from three to six days after the first date on which it could have been presented.[46] The evidence substantiating the current claim comes from the District Attorney's Office's files and the Philadelphia Police Department's files, which were opened on September 22, 2012 and September 25, 2012, respectively. Appellee then filed the Amendment and Supplement to his PCRA petition on September 28, 2012. Accordingly, this Court found that it had jurisdiction under §§ 9545(b)(1) and (2).

II. Not Previously Litigated; Not Waived

Appellee's claim is not "waived" under § 9544(b). A claim of error is waived if a party could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so. Commonwealth v. Peterkin, 649 A.2d 121, 124 (Pa. 1994). There was no prior proceeding in which appellee could have raised the claim that the government suppressed evidence that Draper had been pressured to call the crime a robbery-gone-wrong, or the claim that the government suppressed evidence of the victim's homosexual ephebophilia, as the latter evidence was uncovered in September 2012.

Nor is appellee's claim "previously litigated" under § 9544(a). A claim of error is "previously litigated" when either the "highest appellate court in which the appellee could have had review as a matter of right has ruled on the merits of the issue," or "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42

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[46] The Commonwealth argued that appellee should not be permitted to amend his PCRA petition to conform to the evidence produced at the evidentiary hearing because the documents uncovered during the evidentiary hearing did not constitute a meritorious Brady claim. N.T. 9/25/2012 at 61. This Court was cognizant of the significant interests that the Commonwealth had, and continues to have in this case as regards finality. These are also strong interests in the justice system as a whole and were noted by our Supreme Court in Morris II, as noted in FN 42, *supra*.. However, on balance, this Court found that appellee was entitled to amend pursuant to Pa.R.Crim.P. 905(a). Appellee's request to amend his petition, which was granted and constituted the basis for appellee's subsequent "Amendment and Supplement," distinguishes the procedural posture of this case from Commonwealth v. Porter, 35 A.3d 4 (Pa. 2012).

Pa.C.S. §§ 9544(a)(2), (3). None of the claims raised by appellee in his 1995 PCRA petition was based on the prosecution having suppressed Draper's statement to the government or evidence of the victim's homosexual proclivities towards teenage boys. Not until appellee amended his March 9, 2012 PCRA petition in light of the September 2012 evidentiary hearing has he raised the specific claim upon which relief was granted. Additionally, it would be impossible for a court to have ruled on the merits of appellee's current Brady claim, given that the evidence found in the government's files was uncovered in September 2012. The "merits" of the current issue revolve around whether or not the three prongs of Brady have been met, whereas the "merits" of the issues discussed in appellee's prior PCRA petition revolved around whether or not trial counsel was constitutionally ineffective.

Additionally, the nondisclosure of evidence – and the affirmative mistepresentation by the Commonwealth that such evidence did not exist, as noted *supra* – ensured that the issues about Amos Norwood's homosexual impropriety with boys was not "previously litigated."

III. Success on the Merits

Appellee demonstrated that the government "sanitized" the statements of two witnesses, Mamie Norwood and Reverend Charles Poindexter, removing information that either directly or indirectly demonstrated that the victim was a homosexual ephebophile. N.T. 9/25/2012 at 10-20; 39-40. Additionally, the prosecutor failed to disclose to defense counsel evidence in her possession, as well as in the Philadelphia Police Department's file, that the victim had made sexual advances on a teenage member of his church, and that there were other possible instances of sexual impropriety. N.T. 9/20/2012 (P.M.) at 121-24. With the suppressed evidence in hand, reasonable trial counsel could have pursued an alternate theory at the penalty phase, rooted in evidence that would have been admissible

during the guilt phase and bolstered during the penalty phase of trial. At the guilt phase, both Mamie Norwood and Reverend Poindexter testified that Amos Norwood was a kind church volunteer who spent his time helping underprivileged children. N.T. 1/14/1986 at 157-58; 166-67; 172-74. The information that each had previously provided to the government could have been used on cross-examination to directly contradict *their* characterizations of Mr. Norwood. And, at the penalty phase, a reasonable defense attorney could have called a witness like Ronald House to testify about his experience as a sexual target of Amos Norwood. Based on that evidence, reasonable trial counsel could have credibly argued that appellee was another one of Mr. Norwood's teenage sexual targets, ultimately bolstering appellee's case in mitigation and undermining confidence in the jury's death sentence. Without this evidence, appellee's counsel was given a skewed and incomplete picture of the victim which effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character, and then argued to the jury at the penalty phase that the victim's "kind" and "innocent" nature should be considered against appellee when determining whether to sentence him to death. This Court concluded that, if disclosed, the cumulative impact of this evidence would have enabled reasonable trial counsel to challenge, if not entirely to preclude, the government's sympathetic portrayal of the victim, while also explaining how Norwood's sexual advances amounted to a mitigating "circumstance of the offense" under 42 Pa.C.S. § 9711(e)(8).

Preliminarily, it is important to note that for evidence to qualify as Brady material, it must "involve the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." U.S. v. Agurs, 427 U.S. 97, 103 (1976). Prosecutors do not have to disclose apparently exculpatory evidence "where the parties had equal access to the information or if the defendant knew or could have uncovered such

evidence with reasonable diligence." Commonwealth v. Morris, 822 A.2d 684, 696 (Pa. 2003), *citing* Commonwealth v. Paddy, 800 A.2d 294, 305 (Pa. 2002). The "defense diligence" requirement of Brady has been addressed numerous times by the courts of our Commonwealth. See, e.g., Pursell, 724 A.2d at 305; Paddy, 800 A.2d at 305; Commonwealth v. Johnson, 863 A.2d 423, 426 (Pa. 2004); Commonwealth v. Crews, 863 A.2d 498, 502 (Pa. 2004). Throughout these cases, our Supreme Court has limited the prosecutor's duty under Brady, finding that prosecutors need not disclose "evidence" or "information" in the government's possession that the defendant knew or could have known. See, e.g., Johnson, 863 A.2d at 426 ("No Brady violation where the Appellant knew or could have uncovered the evidence at issue with reasonable diligence."). But that limitation is itself limited; when determining whether the defendant knew or could have known of the suppressed evidence, our courts focus on the *specific evidence* that the defendant claims has been suppressed, not on how that evidence would have been used at trial. When that evidence is either known or knowable to the defense, there is no Brady violation. Paddy, 800 A.2d at 305.

In Johnson, the defendant claimed that an affidavit written and signed by George Robles, a Commonwealth witness, was suppressed. The defendant argued that, as a result, impeachment evidence about Robles being a drug dealer who colluded with police was withheld. Johnson, 863 A.2d at 425. The defendant highlighted six aspects of Robles's affidavit as constituting Brady material. Our Supreme Court's response was narrowly tailored to each aspect of Robles's affidavit, and whether or not the defendant knew of that specific information at the time of trial. Id. at 426-27. Because the Court determined that the defendant either was aware, or could have become aware with reasonable due diligence, of the individual pieces of evidence/information, the Brady claim failed.

In Paddy, the defendant argued that, as part of an unrelated murder, police were investigating a suspect who had been described in the same unique way as the suspect in the case for which Paddy was charged with murder. Paddy argued that information should have been disclosed prior to trial. Paddy, 800 A.2d at 304. Our Supreme Court held that "the information allegedly withheld from the defense was published in Philadelphia's two major newspapers, the Philadelphia Inquirer and the Philadelphia Daily News, months before Paddy's second trial." Id. at 305. The fact that the evidence of this investigation was publicly available meant that it could not form the foundation of a Brady claim.

In Crews, the defendant claimed that the government withheld information about his own military records and his family background, history of mental illness and substance abuse. Our Supreme Court again focused on the precise evidence that the defendant claimed should have been turned over. "There is nothing which demonstrates appellant could not have supplied his family background information and military records himself [N]one of the information he cites was uniquely within the control of the prosecution." Crews, 863 A.2d at 502.

But where the suppressed evidence is unknown, even if it is part of a larger "theory" that includes evidence that *is* known to the defense, there may still be a Brady violation when the government suppresses that unknown evidence. Kyles, 514 U.S. at 429, 447-48. In Kyles, the defendant knew that the key Commonwealth witness, Beanie, planted incriminating evidence in his garbage. Id. at 429. Nevertheless, the United States Supreme Court held that an internal police memorandum calling for the seizure of Kyles' garbage based upon Beanie's suggestion was Brady material. Id. at 447-48. In other words, there was an additional "aspect" or "layer" to the evidence, about which the defendant did not know. Because that additional component to the evidence would have helped to round out

a "theory" favorable to the defendant, the Supreme Court found that it was one piece of suppressed evidence which, along with others, cumulatively undermined confidence in the outcome at trial. Id. at 448.

In Cone, the Supreme Court held that evidence crediting and corroborating a defense theory could be the additional "aspect" or "layer" to the evidence about which the defendant did not know, and which the government had suppressed. Cone, 556 U.S. at 470-71. Mr. Cone knew that he was under the influence of drugs and alcohol when he went on a crime spree. Id. at 474. However, he did not know that witnesses who had seen him several days before and after the murders described him to the police as "wild eyed" and that his behavior was "real weird." Id. at 459. The United States Supreme Court found that the suppressed statements "strengthen[ing] the inference" that Cone was impaired at the time of the crime could have amounted to a viable Brady claim so long as it was ultimately considered "material."[47] Id. at 475.

The Third Circuit recently applied that logic of Kyles and Cone in Simmons v. Beard, holding that, where suppressed evidence constitutes a crucial part of a larger "theory," the non-disclosure of *that* evidence can constitute a viable Brady claim. See Simmons v. Beard, 590 F.3d 223, 238 (3d Cir. 2009) ("Without the evidence suppressed by the prosecution, however, the defense could not credibly proffer such a theory. Had this information been available to the defense before trial, it could have much more effectively attacked the Commonwealth's case..."). Our Supreme Court also recently endorsed the principle that suppressed evidence comprising part of a defense theory – whether that theory

[47] The case was before the United States Supreme Court on a petition for a federal writ of habeas corpus after Mr. Cone had filed two unsuccessful state petitions for post-conviction relief. Cone, 556 U.S. at 461. The issue before the Supreme Court was whether a federal habeas claim is "procedurally defaulted" when it is twice presented to the state courts. After determining that the State's procedural objections "provide no obstacle to judicial review," the Court turned to the merits of the Brady claim. Id. at 469. Ultimately, the Court remanded the case to the District Court "with instructions to give full consideration to the merits of Cone's Brady claim." Id. at 476.

has been pursued *or* could *potentially* have been pursued – can substantiate a Brady claim, as long as that evidence is ultimately "material." Commonwealth v. Ly, 980 A.2d 61, 75 (Pa. 2009) ([T]he protection of Brady extends to the defendant's ability to investigate alternate defense theories and to formulate trial strategy.").

In Ly, three men who identified themselves as "gangsters" demanded that a restaurant owner in Philadelphia's Chinatown pay "protection money." Id. at 66. Soon after corralling three restaurant employees in the kitchen, one worker – Janice Wong (Janice) – escaped out of a side door. The three gangsters ran after her, and eventually the person she called "Second Man" grabbed her arm and turned her to face him in a well-lit street corner. Id. The three men returned Janice to the restaurant, where they found Jade Wong (Jade) on the phone with police. After taking several steps toward the dining area, Janice heard a gunshot, saw Jade bleeding from her head, and then saw Second Man backing out of the side door in the area she believed the shooter would have been. Id. Shortly after the murder, Janice identified Ah Thank Lee as the person she had labeled "First Man." Nearly two years later, on the same day that Janice identified Cam Ly (the appellant) as Second Man, she identified Wong Kin Fung, not Ah Thank Lee, as First Man. Id. at 66-67. The Commonwealth failed to disclose to Mr. Ly that Janice had made an inconsistent identification with respect to First Man. Our Supreme Court held that the government "improperly withheld" the conflicting identification because it could have substantiated an alternate defense theory for Mr. Ly: "it could have been used to question Janice Wong's identification of Appellant as the shooter, especially given the prosecution's attempt to bolster Janice Wong's identification of Appellant with her identification of Ah Thank Lee." Id. at 78. The Ly Court ultimately concluded that the non-disclosure of Janice's conflicting identifications of First Man did not prejudice Mr. Ly because the other evidence against him

was quite strong; she had seen him in a well-lit street corner and never wavered in her identification of him. Id. Under Ly, evidence substantiating an "alternate defense theory" may properly be considered the foundation of a Brady claim, so long as that withheld evidence is "material."[48]

Whereas Johnson, Paddy and Crews all involved information that was known/knowable to the defense, the precise information that the Commonwealth suppressed in the instant case was beyond the scope of appellee's knowledge. The evidence that the Commonwealth withheld was that Amos Norwood had engaged, or may have engaged, in inappropriate sexual behavior with other teenage boys in the past. Appellee

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[48] In Commonwealth v. Willis, 46 A.3d 648 (Pa. 2012), Madame Justice Todd's Opinion Announcing the Judgment of the Court ("OAJC") discussed the principle in Ly that "Brady applies not only to purely exculpatory evidence or to evidence which relates to the credibility of witnesses, but also to evidence which impacts a defendant's ability to investigate alternate defense theories and to formulate trial strategy," and stated that it extends to cover both admissible and inadmissible evidence. Id. at 669-70, *citing* Ly, 980 A.2d at 76. To support the notion that Brady applies to inadmissible evidence, Madame Justice Todd cited to Commonwealth v. Green, 640 A.2d 1242 (Pa. 1994). Mr. Chief Justice Castille wrote a forceful concurring opinion, disagreeing with the OAJC's reliance on Green, instead arguing Green was wrongly decided, as it was based entirely on speculation:

> Here is the Green Court's dispositive analysis: "knowledge of [the undisclosed, inadmissible evidence] certainly would have opened another avenue of investigation for the defense that may well have led to further exculpatory evidence. Had the defense been aware of Moser's statements, it may also have altered its trial strategy, especially in regards to appellant's decision not to testify . . . " There are no specifics in these "may haves." It is simply speculation upon speculation. No specific evidence is identified.

Willis, 46 A.3d 683 (Castille, C.J., concurring).

The Chief Justice then suggested that instead of allowing Brady material to include that which has a "possible effect[ ] upon 'defense preparation," he "would require that the derivative, admissible evidence be specifically identified with an explanation of why it is difference-making under the reasonable probability standard." Id. at 684.

As will be discussed in greater detail in the materiality section *infra*, the withheld evidence in the instant case is distinguishable from that which was suppressed in Willis. Unlike the suppressed statement in Willis, which was made by a co-defendant who would have pled the Fifth Amendment instead of testifying, rendering his prior out-of-court statement inadmissible hearsay, the statements crediting and corroborating appellee's account of inappropriate sexual activity with the victim would have been the backbone of an "alternate" defense theory, and *also* would have been admissible at trial. Therefore, it is possible to calculate the impact that such evidence would have had at the guilt and penalty phases of trial. Whereas in Ly, the impact of evidence supporting an alternate defense theory would not have been "material," this Court found that the evidence withheld in the instant case satisfied the prejudice inquiry because it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [jury's] verdict" of death. Kyles, 514 U.S. at 435.

obviously would have known about prior sexual encounters that *he* had had with Mr. Norwood.[49] But evidence that Mr. Norwood touched Ronald House's genitals, that Reverend Poindexter had received at least one complaint about a specific instance in which Mr. Norwood was sexually inappropriate with a teenage male, and that Mr. Norwood's wife awoke in the middle of the night as her husband left the house with a "young male, slim" and later related a bizarre story to her, was undoubtedly beyond the scope of appellee's conceivable knowledge.

Additionally, any sexual encounter appellee may have had with Mr. Norwood is critically different from the evidence that the government suppressed.[50] The suppressed

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[49] Two pieces of evidence from trial suggest that appellee told Ronald Rucker and Draper something about a prior sexual encounter that he had had with Mr. Norwood. In Mr. Rucker's July 18, 1984 statement to police, he noted that, "Terry said Amos was a homosexual and was the type to pay people." Two days later, Draper told police that, while appellee was retrieving tools from the car with which the murder would eventually be committed, Draper asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yes." Additionally, Dr. David Lisak interviewed appellee on January 11, 2012, January 27, 2012 and February 29, 2012 for a total of approximately 12 hours. Following these interviews, Dr. Lisak wrote that appellee gave him a detailed account of how his sexual relationship with Mr. Norwood began, and how during their multiple sexual encounters, violence had erupted on previous occasions. Appendix to Petition for Post-Conviction Relief, 7/16/2012 at Table 12. Due to the posture of the proceedings before this Court, this Court did not hear testimony from Dr. David Lisak, and no one has heard testimony from appellee regarding sexual encounters between him and Mr. Norwood. There has thus been no opportunity for their credibility to have been determined.

[50] Had evidence that Mr. Norwood was sexually involved with other teenage boys been disclosed, it would have corroborated and credited appellee's own experience. As noted *supra*, appellee had never testified as to his own experience with Mr. Norwood or others, although there was certainly information from other witnesses – some of whom were called by the Commonwealth at his two trials – about his having been sexually active with older males from a young age. This Court has certainly seen in recent years and in cases of such high publicity as the recent Jerry Sandusky trial that young male victims of older male sexual abuse typically do not report such behavior and find it extremely difficult and painful to talk about it.

At trial, appellee testified that, on the night of the killing, a friend, Michael Hopkins, introduced him to Amos Norwood for the first time. N.T. 1/27/1986 at 1178-79. The fact that appellee's trial testimony is inconsistent with the argument that would flow from the suppressed evidence is not dispositive of whether the prosecutor had a duty to disclose such evidence under Brady. As stated *supra*, in Ly, our Supreme Court held that evidence supporting an alternate defense theory was "improperly withheld" after recognizing how the withheld evidence specifically could have been used at trial. Ly, 980 A.2d at 78. The fact that "a defendant may predicate a Brady claim upon prosecutorial suppression that causes the defendant to 'abandon lines of independent investigation, defenses, or trial strategies that [he] otherwise would have pursued,'" means that appellee's trial testimony that he only met Mr. Norwood the night of the murder does not spoil the instant claim. Maynard v. Gov't of the Virgin Islands, 392 Fed. Appx. 105 (3d Cir. 2010) (non-precedential opinion), *citing* U.S. v. Bagley, 473 U.S. 667, 683 (1985) (Blackmun, J., concurring). Had the prosecution disclosed evidence of Mr. Norwood's homosexual ephebophilia in a timely fashion, a reasonable defense attorney could have pursued a penalty-phase strategy

evidence would have allowed reasonable trial counsel to argue that Mr. Norwood was not in control of his impulses. And it would have afforded appellee the opportunity to compare himself to other young victims – whether he testified or not – in contrast to the prosecution's portrayal of him during the penalty-phase closing argument as a cold, calculating killer.[51] But without the suppressed evidence of specific instances of Mr. Norwood's sexual improprieties with other teenagers, any allegation or insinuation from appellee that he had a sexual encounter with Mr. Norwood, which in turn played a role in the commission of the crime, would have merely seemed like an attempt by appellee to sling mud on the victim's character. In other words, that theory would have been incredible. Armed with the complete picture of Mr. Norwood's ephebophilia, appellee "could have much more effectively attacked the Commonwealth's case" at the penalty phase.[52] Simmons, 590 F.3d at 238.

(FN cont'd...) centered around Mr. Norwood's sexual improprieties with teenage boys, and how that was a "circumstance of [appellee's] offense" under 42 Pa.C.S. § 9711(e)(8).

[51] During her closing argument at the penalty phase, Ms. Foulkes stated:

> He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and ***he had no reason*** to commit these crimes. He would have gone on committing those crimes had our system of justice not stopped him. I am asking you, ladies and gentlemen, to impose the death penalty because our system of justice must stop him. He must be stopped.

N.T. 2/3/1986 at 1876-77 (emphasis added).

[52] In Commonwealth v. Martin, a capital case, a 74-year old homosexual male, Guy Goodman, had written, called and visited the defendant while he served a sentence at the Lebanon County Correctional Facility. 5 A.3d 177, 180 (Pa. 2010). The defendant was given permission to leave the prison for two hours. Along with a conspirator, he took that time to go to the home of Mr. Goodman, who propositioned the defendant for sex in exchange for money. The defendant responded by striking the man in the head with a vase, and then duct-taped a plastic bag over Mr. Goodman's head, stole his property and left him to die. Id. at 181. Our Supreme Court concluded that trial counsel had been ineffective for failing to present evidence at the penalty phase that the defendant had been treated for mental disorders arising from sexual abuse by his own uncle, as it would have supported mitigating factors §§ 9711(e)(2), (3). Id. at 203. The Martin Court's conclusion that counsel was ineffective for failing to present that evidence was grounded in the notion that evidence tending to establish an illicit relationship between the victim and the defendant is relevant for mitigation. Id. at 202 (finding that the defendant's history of sexual abuse and "the sexual advances the male victim made to Martin immediately prior to the murder placed Martin under the influence of extreme mental or emotional disturbance

Brady Components

There are three essential components that appellee must demonstrate in order to establish a Brady violation: (1) the evidence was favorable to the accused, either because it is exculpatory or because it is impeaching, (2) the evidence was suppressed by the Commonwealth, either willfully or inadvertently, and (3) the evidence was material, in that its omission resulted in prejudice to the accused. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Commonwealth v. Dennis, 17 A.3d 297, 308 (Pa. 2011) (reversing the order of the first and second elements).

1. "Essential Component" of Brady #1

The first "essential component of a Brady violation" requires that the evidence at issue be admissible, relevant to the jury's decision, and "favorable to the accused because it is exculpatory or because it is impeaching." Strickler, 527 U.S. at 281-82.

In the instant case, the suppressed evidence could have played a role at trial to impeach the testimony of Mamie Norwood and of Reverend Poindexter, and its absence was relied upon by the trial prosecutor for her penalty-phase closing argument. The information eliminated from the respective statements of Mamie Norwood and Reverend Poindexter would have allowed a reasonable defense attorney to impeach them after they testified to the following:

(a) Mamie Norwood:

> ADA FOULKES: You had indicated, in response to questions by the defense attorney, that your husband didn't pick up strangers. Did your husband have occasion to take young people back and forth from time to time in his car?
> MAMIE NORWOOD: The ones that he worked with, yes, that I knew.
> ADA FOULKES: How much of his time would you say, if you know, how often would he do that? Often? Rarely? Middle?
> MAMIE NORWOOD: It would be every week at some point.

(FN cont'd...) at the time of the murder," a mitigating factor). The fact that the evidence probative of such a relationship is circumstantial – as the suppressed evidence was in this case – does not make it less relevant.

ADA FOULKES: And then from time to time, he would chauffeur young people from one point to another; would he not?
MAMIE NORWOOD: The ones that I know he works with, yes.
ADA FOULKES: When he would do that, would he take those young people home?
MAMIE NORWOOD: Yes.

ADA FOULKES: From time to time, did you ever see evidence of that chauffeuring process by things left in your car?
MAMIE NORWOOD: Yes, sometimes.

N.T. 1/14/1986 at 157-58.

(b) Reverend Charles Poindexter[53]:

ADA FOULKES: Did Mr. Norwood have any special responsibility in the church regarding youth?
REV. CHARLES POINDEXTER: Yes, he did.
ADA FOULKES: What were those responsibilities?
REV CHARLES POINDEXTER: He was warden for many years of the acolytes or the service of the church, and he was in charge, he was the founder and in charge of what we called the Youth Theater Fellowship which dealt with youth between the ages of seven and eighteen.
ADA FOULKES: Were there occasions, Reverend, in connection with his duties, where Mr. Norwood would come to the church in the night hours to fulfill some of these duties?
REV. CHARLES POINDEXTER: Yes, there were.
ADA FOULKES: Also, in your contact with Mr. Norwood, did you observe him from time to time transport young people from the church activities to their homes or other locations?
REV. CHARLES POINDEXTER: Frequently.

N.T. 1/14/1986 at 166-67.

[Re-direct]

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[53] In its Motion to Dismiss, the Commonwealth acknowledged that Reverend Poindexter's trial testimony was devoid of any reference to Amos Norwood's homosexual ephebophilia:

> Reverend Poindexter did not remotely suggest any of this [impropriety about Amos Norwood] in his testimony at defendant's 1986 trial. In September 1984, Reverend Poindexter reported to *The Inquirer* that the victim "devoted his life almost entirely to working with young people." Reverend Poindexter further commented that St. Luke's had been packed with more than 1,000 mourners at each of two funeral services for the victim and that his ashes were buried in the church yard. See *Philadelphia Inquirer* Article entitled, "When a Model Teenager is Accused of Murder, dated Sept. 6, 1984

Commonwealth Motion to Dismiss, 9/7/2012, at 32.

ADA FOULKES: Reverend, from time to time, do the church activities extend beyond the people who are parishioners and members of the church?
REV. CHARLES POINDEXTER: Yes, they do.

[*Re-cross*]

MR. PANARELLA: Certainly, church activities or functions are for church members; is that correct?
REV. CHARLES POINDEXTER: Well, the activities that Mr. Norwood participated in very often involve young people outside of our parish congregation. In fact, many who are now active came in as a result of that kind of inclusion.
MR. PANARELLA: And that would occur at organized functions; is that correct?
REV. CHARLES POINDEXTER: Not necessarily. Sometimes they were simply trip services where they were invited to participate.
MR. PANARELLA: There were no church services occurring late in the evening on June 11th; were there?
REV. CHARLES POINDEXTER: Oh, no, of course not.
MR. PANARELLA: And there is nothing of any youth activities or anything of that nature that was going to take place at your church at that time; correct?
REV. CHARLES POINDEXTER: No.
MR. PANARELLA: So when you make reference to unusual or that it would not be unusual to have non-church members come to church functions, it would have been extremely unusual to have a non-parishioner at the church when no church functions were going on?
REV. CHARLES POINDEXTER: No, it would not have been.
MS. FOULKES: Objection.
THE COURT: Overruled.
REV. CHARLES POINDEXTER: No, it would not have been.
MR. PANARELLA: It would not have been unusual to have a non-church member at a non-church function late at night when the church wasn't open to the public?
REV. CHARLES POINDEXTER: No.
MR. PANARELLA: That's correct?
REV. CHARLES POINDEXTER: Would you like me to explain?
MR. PANARELLA: Yes.
REV. CHARLES POINDEXTER: Very often, Mr. Norwood had friends of some of the young people to help with the building of the sets for the plays and, quite often, I saw him with young people or the people who were working with him people that I never knew before.
MR. PANARELLA: Again, you never knew Mr. Williams?
REV. CHARLES POINDEXTER: I never knew Mr. Williams.
MR. PANARELLA: Or Mr. Draper?
REV. CHARLES POINDEXTER: No.
MR. PANARELLA: Now, you were aware, were you not, that Mr. Norwood had some problem in the past?
REV. CHARLES POINDEXTER: Some problem?
ADA FOULKES: Objection, Your Honor.

> THE COURT: Just a moment. I am going to sustain it. I don't know quite what it is or how it is related to the circumstances here, so I will have to sustain the objection at this time.
> MR. PANARELLA: I have nothing further.

Id. at 172-74.

Reasonable defense counsel, having had this evidence prior to trial, would have pursued an alternate strategy in the defense case-in-chief. Though the decision to testify in one's defense is a decision that a defendant must make for himself/herself, defense attorneys have a responsibility to advise their clients about that decision. See Commonwealth v. Carson, 741 A.2d 686, 689 (Pa. 1999) ("It is well settled that the decision to testify on one's behalf is ultimately to be made by the defendant after full consultation with counsel."). With the withheld evidence of Norwood's sexual improprieties with other teenage boys in hand, thereby strengthening the inference that appellee had been sexually exploited by a man almost 40 years his elder, reasonable defense counsel could have attempted to convince his client to stay off the stand. Non-disclosure adversely affected trial counsel's preparation, as consulting with one's client – and being able to discuss the implications of all of the evidence, and particularly of the exculpatory evidence – is a staple of trial preparation.

Had the information in the police activity sheet, containing the full statements of both Reverend Poindexter and Mamie Norwood, been included in the statements which were turned over in discovery, it could have been used by a reasonable defense attorney to properly cross-examine both witnesses where they characterized Mr. Norwood as a kind church volunteer who wanted to help out the kids of the neighborhood. When Mamie Norwood testified that her husband only chauffeured young people that he knew from the church, the Commonwealth "opened the door" to her being cross-examined about her knowledge of Mr. Norwood bringing a young, slim male into their home before driving away with that young man in his car and not returning until the next morning. Likewise, when

Reverend Poindexter testified that Mr. Norwood spent a great deal of time with the acolytes and young people building sets for the church's youth theater group, the Commonwealth "opened the door" to cross-examination about Reverend Poindexter's knowledge that Mr. Norwood had been sexually inappropriate with parishioners.

In addition to the cross-examinations of Mamie Norwood and Reverend Poindexter during the trial, reasonable defense counsel would have called Ronald House to testify during the penalty phase to further flesh out the circumstantial evidence demonstrating that Mr. Norwood was a homosexual ephebophile.[34] Even if appellee never testified about experiencing Mr. Norwood's sexual improprieties, this collection of evidence would have been a sufficient basis upon which a reasonable defense attorney could have vigorously attacked Ms. Foulkes' penalty-phase characterization of the victim as "innocent," and argued during his/her penalty phase closing argument that Mr. Norwood had victimized appellee just as he had done to others, and that those sexual advances had impaired appellee's judgment on the night of the murder.

Facts which strengthen the inference that Mr. Norwood made sexual advances on appellee significantly color "the circumstances of the offense," adding another dimension crucial to making a truly "individualized assessment" and imposing a sentence that "should reflect a reasoned *moral* response to the defendant's background, character, and crime." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original). A reasonable defense attorney would have highlighted how Mr. Norwood's

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[34] Ronald House's testimony that Mr. Norwood attempted to take advantage of him sexually when the two were alone would have been admissible at the penalty phase in 1986, just as it would be admissible today. Pa.R.E. 401 codified the definition of relevance set forth in Commonwealth v. Scott, 389 A.2d 79, 82 (Pa. 1978): "Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant." Evidence that Mr. Norwood had sexually inappropriate relationships with underage males tends to establish the fact that he also had a sexually inappropriate relationship with appellee.

pattern of impropriety was a "circumstance of [this] offense,"[55] offering a reason to view appellee through a mitigating lens. Having established that there is "some" evidence of a mitigating circumstance, a trial judge "shall" instruct the jury on that mitigating circumstance. 42 Pa.C.S. § 9711(c)(1)(ii). When viewed in combination with the details of the crime, evidence of Mr. Norwood's prior improprieties would cast this offense in an entirely different light; the withheld evidence credits and corroborates appellee's own account of having been victimized by Mr. Norwood.[56] Thus, the first essential component – that the withheld evidence was favorable to the accused – has been established.

2. "Essential Component" of Brady #2

The second "essential component of a Brady violation" requires that the evidence at issue be "suppressed by the government, either willfully or inadvertently." Strickler, 527 U.S. at 282. Evidence, whether in the possession of the prosecution or the police, is subject to the Brady duty to disclose. In order to comply with Brady, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S. at 437. For over a decade, our Supreme Court has endorsed that same principle. Commonwealth v. Burke, 781 A.2d 1136, 1142 n.5 (Pa. 2001) (finding it immaterial that a prosecutor was unaware of relevant statements in police files, given that "[t]his Court cannot ignore the obvious implications of Kyles."); Commonwealth v. Gibson, 951 A.2d 1110, 1127 (Pa. 2008) ("The prosecution's duty under Brady incorporates disclosure of all exculpatory evidence, regardless of whether the defense specifically requests such materials, and extends to evidence in the possession of

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[55] 42 Pa.C.S. § 9711(e)(8).

[56] For a full discussion of how the withheld evidence would have altered the jury's perception of the "details of the crime," see the "materiality" section *infra*, p. 50-51.

police agencies of the same government bringing the prosecution.") (internal citations omitted).[37]

In Brady, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment *irrespective of the good faith or bad faith of the prosecution.*" Brady, 373 U.S. at 87 (emphasis added). Though the prosecutor's intent is unimportant in a pure Brady analysis, Pennsylvania courts have found that prosecutorial "gamesmanship" amounting to a violation of discovery rules can be an independent reason to shape a remedy for a defendant where such gamesmanship prejudices the defendant in his ability to present a defense. Commonwealth v. Moose, 602 A.2d 1265, 1273-75 (Pa. 1992) (finding that where the prosecutor hid a statement from defense counsel and told the court that "all available evidence had been provided" required that a new trial be granted because it prejudiced the defendant and otherwise, the court "would be condoning and encouraging such last minute disclosures and gamesmanship."). The Moose Court relied on Commonwealth v. Thiel, 470 A.2d 145, 149 (Pa.Super. 1983), where the Superior Court fashioned a remedy for a defendant after the government withheld information that should have been disclosed under Pa.R.Crim.P. 305(B)(1)(f). The Thiel Court referred to Pa.R.Crim.P. 305(E), which "gives the trial court broad discretion in formulating remedies for a failure to comply with discovery requirements," as the foundation for its decision to grant a new trial. In both Thiel and Moose, the courts of our Commonwealth found that the proper remedy for

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[37] There is no dispute that the Philadelphia District Attorney's Office and the Philadelphia Police Department are part of the "same government." Ms. Foulkes' handwritten note about Ronald House being touched on his genitals and hearing of other possible incidents of sexual abuse was found in the District Attorney's Office trial box for the Norwood case. (See Attachment D, which was marked as Court-2 in the PCRA hearing before this Court.) The June 1984 activity sheet, which detailed the complete versions of the Poindexter and Norwood interviews, was found in the H-84-127 police box. (See Attachment E, which was marked as P-24 in the PCRA hearing before this Court.) Under Kyles and Burke, all of this evidence is properly considered to be within the scope of the prosecutor's control.

prosecutorial "gamesmanship" which violated the rules of discovery and highly prejudiced the defendant was a new trial; here, this Court found that the proper remedy was a new penalty phase.[58]

The "sanitization" of the statements turned over to defense counsel, and the non-disclosure of the information contained in Ms. Foulkes' handwritten notes demonstrates that evidence was plainly "suppressed." That suffices to establish the second prong of a Brady violation.

3. "Essential Component" of Brady #3

The third and final "essential component of a Brady violation" requires that "prejudice ... ensued." Strickler, 527 U.S. at 282. "Prejudice" in this context is defined by the concept of "materiality." For suppressed evidence to be considered "material," there must be a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[59] Cone v. Bell, 556 U.S. 449, 470 (2009), *citing* Kyles, 514 U.S. at 435.

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[58] See the Appendix for this Court's detailed findings.

[59] In its October 2, 2012 filing in the Supreme Court, the Commonwealth argued that the Supreme Court has already decided that, had evidence from the 1998 PCRA hearing been presented to the jury, the jury would still have voted for death rather than life: "That 'evidence' pales in comparison to the evidence before this Court in the prior appeal – evidence from witnesses who claimed that defendant himself was abused by the victim. This Court ruled such evidence insufficient to change the sentencing verdict." Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution, 10/2/2012 at 12-13.

In fact, the Supreme Court's 2004 opinion did not rule that evidence of the victim's homosexual ephebophilia and its potential impact on appellee was insufficient to change the sentencing verdict. Our Supreme Court divided the evidence appellee put forth about counsel's ineffectiveness at trial into three different categories. The Court's review of "the prejudice prong of the ineffectiveness inquiry," which is "in terms of whether 'there is a reasonable probability that at least one juror would have struck a different balance,'" practically was limited to the evidence that appellee claimed trial counsel should have presented. Wiggins v. Smith, 539 U.S. 510, 537 (2003). Writing for the majority, Mr. Justice Eakin first affirmed Judge Savitt's decision that trial counsel was not ineffective for failing to rely on Dr. Edwin P. Camiel's 1985 presentence report given that the report gave "no indication of petitioner's mental impairment at the time of the murder." Williams II, 863 A.2d at 520. The

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to . . reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice.

Brady, 373 U.S. at 87-88.

When undertaking the "materiality" analysis, the Court in Kyles echoed that "[f]our aspects of materiality under *Bagley* bear emphasis" to help guide the determination. Kyles, 514 U.S. at 434. The fourth aspect is particularly relevant to this case: "materiality is to be judged by reference to the "suppressed evidence considered collectively, not item-by-item" with the focus on the "cumulative effect of suppression." Kyles, 514 U.S. at 437; Ly, 980 A.2d at 84. Practically, courts analyze the "cumulative effect of suppression" through two inquiries: whether suppression negatively impacted the defense's case, and whether the government took advantage of the fact that evidence favorable to the accused was withheld.

In U.S. v. Perdomo, the Third Circuit measured the impact of suppression on the defense's case by considering the "possible effects of non-disclosure on the defense's trial preparation," and by asking whether had that evidence been "*disclosed and used effectively*, it may make the difference between conviction and acquittal." 929 F.2d 967, 971-72 (3d Cir. 1991)

(FN cont'd...) Court then affirmed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present witnesses who could have testified to appellee's abusive childhood. Id. at 519-21. Lastly, the Court endorsed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present mental health experts on appellee's behalf. Id. When upholding Judge Savitt's decision that appellee failed to demonstrate a reasonable probability that the introduction of mental health expert testimony would have undermined confidence in the verdict, Mr. Justice Eakin deferred to Judge Savitt's determinations in weighing the evidence: "Accordingly, we perceive no abuse of discretion by the PCRA court in weighing the evidence, and we will not disturb the court's determination." Williams II, 863 A.2d at 520.

But, as noted *supra*, after the Commonwealth confirmed Judge Savitt's incomplete understanding of the evidence that "there is nothing in the case involving Norwood's homosexuality or violation of young boys," Judge Savitt dismissed the impact that such information would have had when he engaged in weighing the testimony. N.T. 4/8/1998 at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605. In other words, Judge Savitt found that any evidence of Amos Norwood's homosexual impropriety was not worthy of consideration in light of the Commonwealth's misrepresentation that it did not exist. Accordingly, neither Judge Savitt nor our Supreme Court has ever had occasion to address whether or not there is a reasonable probability that, had reasonable trial counsel presented to the jury the suppressed evidence of Amos Norwood's sexual improprieties with teenage boys, such evidence would have undermined confidence in the verdict at the penalty phase.

(emphasis in original). In that case, the government unknowingly misrepresented to the defense that its key witness did not have a criminal history, despite that witness in fact having two prior convictions. Id. at 970-72. "Such information would have been critical in presenting the witness' mental state, demeanor and behavior to the jury, and in questioning the witness' credibility." Id. at 972. The Perdomo Court stressed that the impact of suppression on the testimony that the defense "would have been able to elicit" was magnified by the government's misrepresentation, which misleadingly induced defense counsel into believing that the witness could not be impeached. Id. The cumulative impact of suppression presented an "undisputable argument that a Brady violation occurred." Id. at 974.

While the Perdomo Court tackled the "materiality" question from the perspective of how suppression impacted the defense's case, a number of other cases have emphasized that evidence is more likely to be considered "material" when the government seizes upon and exploits the presence (or absence) of the suppressed evidence. The Kyles Court considered the "word of the prosecutor" relevant to the materiality computation. The United States Supreme Court found impeachment evidence of two witnesses to be material in part because that evidence contradicted the argument set forth by the prosecutor during closing arguments. Kyles, 514 U.S. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses."). In Banks v. Dretke, as part of its "materiality" or "prejudice" analysis under Brady, the Supreme Court echoed that a prosecutor's comments may be relevant.[40] The fact that a prosecutor exploits the absence of

[40] Though Banks discussed whether or not there was a violation of the due process right to a fair trial for the prosecution's failure to correct false testimony, the Supreme Court explicitly stated that it granted relief under Brady, and did not reach the issue as to whether or not relief was merited under Giglio v U.S., 405 U.S. 150

suppressed evidence during its penalty phase closing argument – as the trial prosecutor did here – is another reason to consider the suppressed evidence "material":

> Regarding "prejudice," the contrast between Strickler and Banks's case is marked. . . Most tellingly, the witness' testimony in Strickler "did not relate to [the defendant's] eligibility for the death sentence"; it "was not relied upon by the prosecution at all during its closing argument at the penalty phase." In contrast, Farr's testimony was the centerpiece of Banks's prosecution penalty-phase case.

Banks, 540 U.S. at 700-01 (citations omitted).

Recently, the Third Circuit blended both components of the materiality inquiry into one "overall" analysis. The Simmons Court engaged in the "materiality" analysis by contrasting the picture that trial counsel would have presented had the suppressed evidence been disclosed against "what actually happened" at trial. Simmons, 590 F.3d at 238.

> Overall, the picture of what Simmons's trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened. The two key witnesses presented by the state would have been substantially less credible, thus undermining the main evidence implicating Simmons in Knaze's death and Cobaugh's assault. Therefore, we agree with the District Court and hold that, cumulatively, the Commonwealth's *Brady* violations leave us without confidence in Simmons's conviction.

Id. at 238-39.

Thus, it was particularly helpful to this Court, in assessing materiality, to compare the evidence in the government's possession against that which was given to appellee's counsel in discovery.[61] See Dennis, 17 A.3d at 309 ("A reviewing court is not to review the evidence in isolation, but, rather, the omission is to be evaluated in the context of the entire record.").

(i) A June 1984 police activity sheet revealed that the police learned during a June 22, 1984 interview with Reverend Charles Poindexter that the victim

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(FN cont'd...) (1972). 540 U.S. at 690 n.11 ("Because we conclude that Banks qualifies for relief under Brady, we need not decide whether a Giglio claim, to warrant adjudication, must be separately pleaded.").

[61] A November 15, 1984 letter from Arnold H. Gordon, Esquire, Chief of Homicide Unit to Nicholas Panarella listed the discovery – other than the Medical Examiner's report, which was sent under separate cover – that was passed upon Mr. Panarella's request. (See the first two pages only of Attachment F, marked Exhibit C-2 in the PCRA hearing before this Court).

"may have been a homosexual," and that Reverend Poindexter had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." Additionally, the activity sheet notes that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 1). However, the version of the June 22, 1984 interview that the prosecution turned over to the defense omitted those portions of Rev. Poindexter's statement entirely. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19).

(ii) The same June 1984 police activity sheet also revealed that the police learned that Mamie Norwood had told them about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. She then watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made

no comment on her belief in the veracity of the story." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 2). However, the version of Mrs. Norwood's statement turned over to the defense omitted this portion of her statement entirely. (See Attachment F, which was marked C-2 in the PCRA hearing before this Court, item 17).

(iii) A handwritten note by Assistant District Attorney Andrea Foulkes in the District Attorney's Office's file for the Norwood matter recounted evidence of a specific instance of Amos Norwood's homosexual ephebophilia. She wrote the name of the young man, "Ronald House," "touched on privates," and that he "heard about other possible incidents." (See Attachment D, which was marked Court-2 in the PCRA hearing before this Court). However, none of that information was turned over to the defense.

Without the evidence in hand that explicitly or inferentially connected Amos Norwood to acts of homosexual ephebophilia, the information that was actually provided to the defense created the false impression that references to Amos Norwood's homosexuality and alleged "kidnapping" had nothing to do with who he really was or with the case.[42] The government did disclose Jesse Lofton's and William Scott's statements, both of which

[42] The version of Reverend Poindexter's statement turned over to the defense mentioned the supposed "kidnapping." In the statement disclosed to the defense, Reverend Poindexter speculated that the kidnapping had something to do with "drugs" because Mr. Norwood worked as a chemist in New Jersey. Reverend Poindexter thought the incident was reported to the police. He was generally unclear as to what really happened. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19). The fact that there was a clear version of this story from the one person who was an eyewitness and would actually know what happened – Mamie Norwood – goes to show that the defense was given a misleading, confusing picture based on the speculation of others.

included one question as to the interviewee's possible knowledge regarding Amos Norwood being homosexual. Both interviewees answered in the negative.[63]

Without the evidence above, the defense had two pieces of information suggesting that Mr. Norwood was a homosexual: Ronald Rucker's statement that "Terry said Amos was a homosexual and was the type to pay people,"[64] and Draper's statement that, shortly before killing Mr. Norwood, appellee "was going to tell [Mamie Norwood] that Amos was gay. He wanted to extort money from him, but she did not pay no [sic] attention to him, she just kept walking to the house."[65] And the defense had one nebulous piece of information suggesting that Mr. Norwood was an ephebophile – Draper's statement that when he was alone with the victim in the cemetery, he asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yea."[66]

In two different places during her penalty-phase closing argument, the trial prosecutor's comments about appellee's motive for the commission of this crime could have been effectively rebutted – or precluded – had the suppressed evidence been disclosed. First, she said:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

N.T. 2/3/1986 at 1873.

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[63] See Attachments L (page 2) and M (page 3), marked C-2 in the PCRA hearing before this Court, referring to items 13 and 24, respectively.

[64] See Attachment N, which was marked P-10 in the PCRA hearing before this Court.

[65] See Attachment O, which was marked P-2 in the PCRA hearing before this Court.

[66] Id.

Shortly thereafter, the trial prosecutor concluded, "He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes." Id. at 1876-77.

However, as someone who had the privilege of viewing the suppressed evidence in the government's possession collectively during the kind of trial preparation in which reasonable defense counsel would also have engaged, Ms. Foulkes admitted at the PCRA hearing before this Court, "Did I suspect that there was a sexual connection between them? Yes I did." When this Court asked her, "so maybe [Williams] is doing Norwood and getting money?" she responded, "No. Of course it occurred to me . . ." N.T. 9/20/2012 (P.M.) at 109-10. Ms. Foulkes stated "of course" she felt that there was a homosexual relationship between appellee and Norwood because she was able to connect all the dots. Without access to that same evidence, defense counsel was misleadingly induced into accepting the characterizations of Norwood that were included in the discovery packet, such as William Scott's statement that Norwood was "one of the straightest persons as far as I knew." (See Attachment M). Had evidence of Norwood's sexual proclivities for teenage boys been "*disclosed and used effectively*,"[67] a reasonable defense attorney could have drawn the jury's attention to such evidence during the penalty phase, enabling the jury to connect the dots about a man in his mid-50s having a sexual relationship with yet another teenage boy.

Instead of having the trial prosecutor rebut her own penalty-phase closing argument more than 26 years after delivering it, had she disclosed the suppressed evidence, a reasonable defense attorney would have been able to directly contradict or prevent her argument that day. Not only would reasonable defense counsel have directly rebutted the

[67] Perdomo, 929 F.2d at 972.

centerpiece of the Commonwealth's penalty-phase closing argument – that appellee killed Amos Norwood "for no other reason but that a kind man offered him a ride home"[48] – but that attorney would have then explained how the sexual pressure imposed on appellee by Norwood was a "circumstance of his offense," as it clouded his judgment. The United States Supreme Court suggested in Cone there was a reasonable probability that, had the suppressed evidence crediting and corroborating an explanation for a defendant's aberrant behavior been disclosed, the result of the proceeding at the penalty phase would have been different. Cone, 556 U.S. at 470. Under Tennessee law, evidence tending to establish that a defendant's judgment was "substantially affected" is relevant to a jury's consideration as to whether death is the appropriate sentence. Id. at 456 n.3. Though the Supreme Court found that it would be inappropriate to be the first court to make the "materiality" determination, the Court noted that the suppressed evidence "may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone's drug use played a mitigating, though not exculpating, role in the crimes he committed." Id. at 475.

Likewise, each of the documents withheld by the government in this case shared a common feature: each strengthened the inference that the victim was sexually involved with multiple teenagers in his community, and that potentially included appellee. As in Cone, the suppressed evidence would have been pertinent to explaining the bizarre behavior of the accused, as well as circumstances which might have motivated the killing. In both cases, the accused committed atrocious, violent crimes. See Williams, 637 F.3d at 200-01; Cone, 556 U.S. at 453. And, in both cases, the suppressed evidence could have been used at trial to persuade the jury that the defendant's judgment was "substantially affected," in contrast to

[48] N.T. 2/3/1986 at 1871-75.

the government's presentation of Mr. Cone as a "calculating, intelligent criminal who was fully in control of his decisions and actions at the time of the crimes,"[69] and in contrast to the government's presentation of appellee as a calculating, heartless killer,[70] despite having "all kinds of advantages." N.T. 2/3/1986 at 1873-75.

Though the government suppressed only a few choice statements, the impact of suppression was far-reaching.[71] As part of the consideration of "the defendant's ability to investigate alternate defense theories and to formulate trial strategy"[72] this Court found that reasonable defense counsel could and would have taken the following measures had the suppressed evidence been disclosed: during the penalty phase, reasonable defense counsel would have re-called Reverend Poindexter, questioning the Reverend about the basis of his belief that Mr. Norwood was a homosexual, that Mr. Norwood had used his position at the church to surround himself with adolescent boys – he had in fact established a Youth Theater group, and that complaints had been lodged about Norwood's sexual advances on some of those boys. That testimony would have changed at least one juror's view of Mr. Norwood. It would have been natural to second-guess whether Mr. Norwood intended to engage in a sexual act with appellee on the night of the murder. Viewed through that lens,

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[69] Cone, 556 U.S. at 454.

[70] The prosecution argued that appellee decided to pursue a life of crime, which culminated in his decision to "squash[ ] [the victim] like a bug that you might be irritated with against a windshield." N.T. 2/3/1986 at 1973.

[71] In Lapointe v. Commissioner of Correction, __ A.3d __, 138 Conn.App. 454 (Oct. 9, 2012), the Appellate Court of Connecticut held that a police detective's note – which read "30-40 mins. Poss." – reflecting information that the detective had received from fire marshals as to a possible burn time of a fire allegedly set by the defendant, was suppressed. The Lapointe Court found that this evidence, which would have been used to buttress an alibi defense, was "material." As demonstrated by Lapointe, even small handwritten notes found in the government's files will be considered "material" when supporting a theory that contradicts evidence of guilt put forth by the prosecution. While this recent case obviously has no precedential value in Pennsylvania, this Court found Lapointe to be helpful, as Ms. Foulkes' handwritten notes and the other items suppressed would have supported a theory contradicting evidence of culpability meriting death put forth by the prosecution.

[72] Ly, 980 A.2d at 76.

reasonable defense counsel would also have re-called Mamie Norwood in order to highlight the parallels between the decedent's actions on the night of the killing and the night in which Mr. Norwood brought a "young male, slim" into his home, then drove that person away in his car and did not return until the next morning. Draper testified at trial that appellee – a young, slim male – went into Mr. Norwood's home "for like 15, 20 minutes, and I was wondering what was taking him so long, so I walked back down the street, and that's when he was coming out of the house." N.T. 1/22/1986 at 668. After appellee emerged from Mr. Norwood's home with $10, Mr. Norwood picked appellee up in his car and drove off for a few minutes. Id. at 671-72. When they returned, appellee told Draper to ask for a ride home; Draper got in the car and directed Norwood, ultimately ending up at the cemetery, where he was killed. Id. at 672-75. The similarities between the night of the murder and the previous suspicious late-night activity with an adolescent boy supports the argument that appellee was another one of Norwood's teenage sexual targets. And finally, appellee would have called Ronald House to testify that when he and Mr. Norwood were alone, Mr. Norwood propositioned him for sex and touched his genitals.[73]

Viewed cumulatively, the non-disclosed evidence would have enabled appellee's attorney to argue *credibly* in his closing argument during the penalty phase that Amos Norwood was a homosexual ephebophile who had taken advantage of a number of boys, including appellee. Appellee's penalty-phase closing argument could have focused on explaining how appellee's judgment was "substantially affected" by Norwood's sexual impropriety, which "may have been enough to have one juror find a mitigating circumstance,

[73] Of course, armed with all of this evidence connecting these dots, reasonable defense counsel would also have hired an investigator to speak to the acolytes and youth theater participants with whom Amos Norwood worked at St. Luke's. See N.T. 1/14/1986 at 157-58; 166-67; 172-74. Many more victims of Mr. Norwood's ephebophilia might well have turned up.

at which point the jury would have had to weigh the mitigating circumstances against the aggravating circumstances."[74] Ly, 980 A.2d at 85, *citing* Commonwealth v. Rush, 838 A.2d 651, 661 (Pa. 2003).

Considering the totality of the circumstances, including possible effects of non-disclosure on the defense's trial preparation, an argument by a reasonable defense attorney about how evidence of Norwood's sexual misbehavior with teenage boys meant that appellee lashed out as a result of having been sexually abused may have been enough to have one juror find a mitigating circumstance under § 9711(e)(8). Had evidence crediting appellee's experience with Norwood been available, it would have "tend[ed] to . . reduce the penalty," thereby "cast[ing] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." Brady, 373 U.S. at 87-88. Cumulatively, this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" of death. Cone, 556 U.S. at 470.

Appellee demonstrated that this Court had jurisdiction and, for all of the reasons stated herein, that he is entitled to relief in the form of a new penalty phase.

BY THE COURT:

M. TERESA SARMINA, J.

[74] If the jury was deadlocked, unable to unanimously vote for death, the judge would be required to impose a sentence of life imprisonment. See 42 Pa.C.S. § 9711(c)(v) ("The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.").